Docket for 02-1028

(30)

No. 02-1028
Title: Norfolk Southern Railway Company, Petitioner
v.
James N. Kirby, Pty Ltd., dba Kirby Engineering, and Allianz Australia Insurance Limited
Docketed: January 8, 2003
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (01-13776)
Decision Date: August 8, 2002
Rehearing Denied: October 7, 2002
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jan 6 2003	Petition for writ of certiorari filed. (Response due February 7, 2003)
Feb 4 2003	Waiver of right of respondents James N. Kirby, Pty Ltd., dba Kirby Engineering, and Allianz Australia Limited to respond filed.
Feb 4 2003	Consent to the filing of amici briefs in support of either party or neither party received from counsel for the respondents, Kirby and MMI General Insurance.
Feb 4 2003	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Feb 4 2003	DISTRIBUTED for Conference of February 21, 2003.
Feb 6 2003	Brief amicus curiae of Association of American Rairoads filed.
Feb 7 2003	Brief amicus curiae of Transportation Loss Prevention and Security Association filed.
Feb 19 2003	Response Requested . (Due March 21, 2003)
Mar 21 2003	Response to petition from respondents James N. Kirby, Pty Ltd., dba Kirby Engineering, and Allianz Australia Limited filed.
Apr 1 2003	Reply of petitioner Norfolk Southern Railway Company filed.
Apr 2 2003	REDISTRIBUTED for Conference of April 18, 2003.
Apr 21 2003	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Nov 14 2003	Brief amicus curiae of United States filed.
Dec 10 2003	Supplemental brief of respondents James N. Kirby, Pty Ltd., dba Kirby Engineering, and Allianz Australia Limited filed.
Dec 10 2003	DISTRIBUTED for Conference of January 9, 2004.
Dec 15 2003	Supplemental brief of petitioner Norfolk Southern Railway Company filed. (Distributed)
Jan 9 2004	Petition GRANTED.
Jan 12 2004	Consent to the filing of amicus briefs in support of either party or neither party received from counsel for respondents, Kirby and MMI General Insurance.
Feb 5 2004	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Feb 13 2004	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including March 24, 2004.
Feb 13 2004	Extension of time within which to file respondent's brief on the merits to and including May 28, 2004.
Mar 22 2004	Brief amici curiae of American Steamship Owners Mutual Protection and Indemnity

	Association, Inc., et al. filed.
Mar 24 2004	Brief amicus curiae of United States filed.
Mar 24 2004	Joint appendix filed.
Mar 24 2004	Brief of petitioner Norfolk Southern Railway Company filed.
Mar 24 2004	Brief amicus curiae of National Association of Waterfront Employers filed.
Mar 24 2004	Brief amicus curiae of World Shipping Council filed.
Mar 24 2004	Brief amicus curiae of Transportation Loss Prevention and Security Association filed.
Mar 24 2004	Brief amicus curiae of Association of American Railroads filed.
Mar 24 2004	Brief amicus curiae of Air Transport Association of America, Inc. filed.
May 28 2004	Brief of respondents James N. Kirby, Pty Ltd., dba Kirby Engineering, and Allianz Australia Limited filed.
May 28 2004	Brief amicus curiae of Jan Ramberg filed.
May 28 2004	Brief amici curiae of Professors Francesco Berlingieri (Italy), et al. filed.
May 28 2004	Brief amicus curiae of Public Citizen, Inc. filed.
May 28 2004	Brief amici curiae of American Institute of Marine Underwriters, et al. filed.
May 28 2004	Brief amicus curiae of Transportation Intermediaries Association filed.
May 28 2004	Brief amicus curiae of Professor Martin Davies filed.
May 28 2004	Brief amici curiae of National Industrial Transportation League, et al. filed.
May 28 2004	Brief amicus curiae of International Cargo Loss Prevention, Inc. filed.
Jun 9 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jun 28 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jul 2 2004	Reply of petitioner Norfolk Southern Railway Company filed.
Jul 23 2004	CIRCULATED.
Aug 10 2004	Record received from U.S.D.C.- Northern District of Georgia. (1 box)
Aug 17 2004	Record received from U.S.C.A. - 11th Circuit. (1 envelope)
Aug 24 2004	SET FOR ARGUMENT Wednesday, October 6, 2004.
Sep 24 2004	The parties are directed to file supplemental briefs addressing the following question: "Does federal or state substantive law govern the questions presented?" The Acting Solicitor General is invited to file an amicus brief on the same question. Briefs are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, October 4, 2004. Twenty copies of the briefs prepared under Rule 33.2 may be filed initially in order to meet the October 4 filing date. Forty copies of the briefs prepared under Rule 33.1 are to be filed as soon as possible thereafter.
Oct 4 2004	Supplemental brief of petitioner Norfolk Southern Railway Company filed. (Distributed)
Oct 4 2004	Supplemental brief of respondents James N. Kirby, Pty Ltd., dba Kirby Engineering, and Allianz Australia Limited filed. (Distributed) TBP
Oct 4 2004	Supplemental brief of United States filed. (Distributed)
Oct 6 2004	Argued. For petitioner: Carter G. Phillips, Washington, D.C.; and on behalf of the United States, as amicus curiae, Thomas G. Hungar, Deputy Solicitor General, Department of Justice, Washington, D.C. For respondents: David C. Frederick, Washington, D.C.

Supreme Court, U.S.
FILED

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No. 02-

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY PTY LTD D/B/A KIRBY ENGINEERING, MMI GENERAL INSURANCE, LTD.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether a cargo owner that contracts with a freight-forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with carriers to provide that transportation.

2. Whether federal maritime law requires that terms of a bill of lading extending liability limitations under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. §§ 1300-1315, to "independent contractors" used to perform the contract of transportation must be narrowly construed to cover only those independent contractors in privity of contract with the bill's issuer.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that its parent corporation is the Norfolk Southern Corporation. No other publicly held corporation owns more than 10% of petitioner's stock.

All parties to the proceeding are listed in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Norfolk Southern Railway Company ("Norfolk Southern") respectfully requests that this Court grant its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 300 F.3d 1300 (11th Cir. 2002) and appears in the Appendix of this Petition ("Pet. App.") at 1a-20a. The court of appeals' unpublished order denying the petition for rehearing *en banc* appears at Pet. App. 39a-40a. The district court's memorandum opinion and order granting partial summary judgment on behalf of Norfolk Southern is unpublished and appears at Pet. App. 27a-38a. The district court's order certifying an appeal to the court of appeals pursuant to 28 U.S.C. § 1292(b) appears at Pet. App. 21a-26a.

JURISDICTION

The court of appeals entered judgment on August 8, 2002, and denied a timely petition for rehearing on October 7, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF STATUTORY AND OTHER FEDERAL LAW

The Carriage of Goods by Sea Act, known as COGSA, ch. 229, 49 Stat. 1207 (1936), is codified at 46 U.S.C. app. §§ 1300-1315 and is reproduced at Pet. App. 41a-53a. Federal maritime law governs the contractual extension of liability limitations under COGSA in bills of lading. See *Wemhoener Pressen* v. *Ceres Marine Terminals, Inc.*, 5 F.3d 734, 741 (4th Cir. 1993).

STATEMENT OF THE CASE

This case presents two important questions of federal maritime law that have divided the lower courts. First, the Eleventh Circuit, in conflict with precedents of multiple courts of appeals and of this Court, has ruled that a freight forwarder that contracts with a cargo owner as a carrier is not the agent of the owner in contracting with vessel carriers to provide the actual transportation of the goods. Thus, under the decision below, the cargo owner is not bound by the terms of the bill of lading that the vessel carrier issues to the freight forwarder. The remarkable and unprecedented holding that the vessel carrier's bill of lading is unenforceable against the cargo owner not only destroys predictability and settled expectations in international trade, but it also eviscerates the mandatory federal statutory definition of a vessel carrier's rights, duties, liabilities and immunities under COGSA, which are only operative as compulsory terms of the bill of lading.

Second, in construing relational terms like "independent contractors" in the "Himalaya clause" of a bill of lading that extends COGSA's liability limitations to other parties whose services are used to perform the contract of transportation, the Eleventh Circuit has joined the Second Circuit in holding that "[i]n this Circuit . . . the law requires privity between the carrier and the party seeking shelter in the Himalaya clause." Pet. App. 13a-14a. These circuits are in direct and acknowledged conflict with the Ninth Circuit, which "rejects the [cargo owner's] argument that privity of contract is required in order to benefit from a Himalaya Clause." *Akiyama Corp. of Am.* v. *M.V. Hanjin Marseilles*, 162 F.3d 571, 574 (9th Cir. 1998). Review is particularly critical because the bill of lading at issue here is the standard form used by freight forwarders worldwide for multimodal international transportation, which commonly involves downstream carriers and other independent contractors who lack the privity required by the court below.

Conflicts among the major maritime circuits on such critical issues are inherently untenable, and even more so when the decision below frustrates reliance interests of carriers in international trade. The very purpose of COGSA, and of the Himalaya clauses that are ubiquitous in the international transportation of goods, is to establish certainty as to the potential liability of carriers *ex ante*. In practice, carriers set their rates and transact business based on the assumption that their liability is strictly limited under COGSA. Rather than opt out of this limitation by declaring the actual value of the goods and paying a higher rate, shippers (like respondent James N. Kirby, Pty Ltd. ("Kirby")) almost universally accept the lower rate and turn to insurance to cover potential damage or loss of goods in transit. The insurer (like respondent MMI General Insurance Limited ("MMI")) in turn charges premiums to compensate it for the risk of full liability beyond the COGSA limit. Respondents have sought to undo the bargain that they struck. By ruling in favor of respondents, the Eleventh Circuit deviated from the carefully calibrated liability scheme of COGSA and gave those parties a wholly unwarranted windfall at the expense of carriers. This Court should grant review to resolve the conflicts of authority and to protect the reliance interests that have developed under the COGSA regime.[1]

Statutory Background

COGSA "is the central statute in commercial admiralty, governing over $200 billion worth of American foreign commerce annually." Michael F. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5) (Part*

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[1] Conflicts on issues of maritime law are particularly problematic because "litigants can easily exploit them through forum shopping": a plaintiff may sue in rem wherever a vessel is located or in personam wherever process may be served on the defendant or the defendant's property may be attached. *See* Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 Tex. L. Rev. 1251, 1268 (1989) ("*Observations*"). *See infra* at 29.

I), 19 J. Mar. L. & Com. 1, 2 (1988). Congress enacted the statute in 1936 to supplement the 1893 Harter Act, ch. 105, 27 Stat. 445 (codified as amended at 46 U.S.C. app. § 190-196), which limited the liability of vessels and carriers in maritime commerce. Congress based COGSA in large part on the Hague Rules, born of an international convention, whose drafters "sought to allocate risks between carriers and cargo interests under clear, predictable rules that would be simple to apply in commerce." Michael F. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5) (Part II)*, 19 J. Mar. L. & Com. 157, 161 (1988) ("*Part II*"); accord *Robert C. Herd & Co.* v. *Krawill Mach. Corp.*, 359 U.S. 297, 301 (1959) (detailing history leading up to COGSA and noting that the Hague Rules were intended "to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers . . . in international trade").

COGSA provides that "[e]very bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade shall have effect subject to the provisions of this chapter." 46 U.S.C. app. § 1300. Sections 2 through 4 of COGSA, *id.* §§ 1302-1304, set forth the duties, rights, liabilities and immunities of the ship and the carrier as "compulsory terms" of the bill of lading. G. Gilmore & C. Black, Jr., *The Law of Admiralty* § 3-38, at 172 (2d ed. 1975). In particular, section 4(5) of COGSA limits the liability of carriers operating in international shipping by providing that "[n]either the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States." 46 U.S.C. app. § 1304(5). This rule applies "unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading." *Id.* Section 4(5) thus protects shippers by setting a floor of $500 per package or unit below which carriers may not reduce their maximum

liability, but "cast[s] upon the shipper the burden of declaring the nature and value of the goods, and paying a higher tariff, if necessary, if he wishe[s] to impose a higher liability upon the carrier." *Standard Electrica, S.A.* v. *Hamburg Sudamerikanische Dampfschifffahrts-Gelsellschaft*, 375 F.2d 943, 945 (2d Cir. 1967).

COGSA's liability limitations directly apply only to a ship or "carrier," defined as "the owner or the charterer who enters into a contract of carriage with a shipper," and only during the period from "when the goods are loaded on to the time when they are discharged from the ship." 46 U.S.C. app. § 1301(a), (e). Nonetheless, COGSA specifically contemplates that shippers and carriers may make agreements governing responsibility and liability "prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea." *Id.* § 1307. Federal maritime law further permits "Himalaya clauses" extending COGSA liability limitations to persons other than the carrier. See *Robert C. Herd & Co.*, 359 U.S. at 302-03; *SPM Corp.* v. *M/V Ming Moon*, 965 F.2d 1297, 1305 (3d Cir. 1992); *Generali* v. *D'Amico*, 766 F.2d 485, 487-88 (11th Cir. 1985); *Secrest Mach. Corp.* v. *S.S. Tiber*, 450 F.2d 285, 286-87 (5th Cir. 1971).[2]

Factual Background

Respondent Kirby, an Australian firm that manufactures machinery, wished to ship ten containers of machinery to the General Motors plant in Huntsville, Alabama. Kirby contracted with International Cargo Control Pty Ltd. ("ICC"), an Australian freight forwarder, which is "a company that arranges for, coordinates, and facilitates cargo transport," but does not actually transport the goods in question. Pet. App.

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[2] As the court below noted, "Himalaya clauses take their name from an English case which involved a vessel called the HIMALAYA." Pet. App. 2a n.1.

3a. The parties memorialized their agreement in a bill of lading issued to Kirby by ICC.

The ICC bill of lading used the standard form developed by International Federation of Freight Forwarders Association ("FIATA"): the FIATA Multimodal Transport Bill of Lading, commonly referred to as the "FBL." Pet. App. 8a. The importance of the FBL to international shipping transactions of the kind here at issue cannot be overstated. The FBL is "the world's most frequently used combined transport document," Peter Jonès, *FIATA Legal Handbook on Forwarding* 30 (2d ed. 1993), and has been declared "the most important document used in freight forwarding." Jan Ramberg, *The Law of Freight Forwarding and the 1992 FIATA Multimodal Transport Bill of Lading* 5 (1993) (quoting FIATA's President).

The FBL for the shipment in issue identifies Kirby as the consignor of the goods, and designates the Queensland Star (operated by the carrier Hamburg Sudamerikanische Dampfschifahrts-Geseilschaft Eggert & Amsink ("Hamburg Sud")) as the ocean vessel to carry the cargo from Sydney, Australia to Savannah, Georgia. Pet. App. 65a. This FBL is a through bill of lading that denominates Huntsville, Alabama (inland from Savannah) as the ultimate destination for the goods. See *id.* The FBL attaches and incorporates the standard FBL conditions. See *id.* at 54a-60a, 67a; cf. Ramberg, *supra*, at App. I, at 80-82. Under this bill of lading, ICC is the "Freight Forwarder," defined as the "Multimodal Transport Operator who issues this FBL and is named on the face of it and assumes liability for the performance of the multimodal transport contract as a carrier." Pet. App. 54a (ICC bill "Definitions"). The contract specifically contemplates that ICC may engage other carriers to perform the contract: "By issuance of the FBL the Freight Forwarder a) undertakes to perform *and/or . . . procure the performance of the entire transport*, from the place at which the goods are taken in charge (place of receipt evidenced in this FBL) to the

place of delivery designated in this FBL [and] b) assumes liability as set out in these conditions." *Id.* at 54a-55a (ICC bill ¶ 2.1) (emphasis added). The FBL further provides that, subject to other conditions in the bill, the Freight Forwarder "shall be responsible for the acts and omissions of his servants or agents acting within the scope of their employment, or *any other person of whose services he makes use for the performance of the contract evidenced by this FBL*, as if such acts and omissions were his own" in any "period from the time the Freight Forwarder has taken the goods in his charge to the time of their delivery." *Id.* at 55a, 56a (ICC bill ¶¶ 2.2, 6.1) (emphasis added).

The FBL contains a Clause Paramount, which (with exceptions) designates the defenses and limitations of liability set forth in COGSA to govern ICC's potential liability to Kirby should the goods become damaged during transport. Pet. App. 57a-59a (ICC bill ¶¶ 7.3, 8).[3] Pursuant to this clause, Kirby agreed that in the event of damage to the goods, ICC's liability would be limited to $500 per container unless Kirby declared a higher value for its machinery and paid a correspondingly higher freight rate. As most shippers do, Kirby elected not to designate a higher value for its goods and instead turned to an insurer, MMI, to cover the shipment.

The FBL also contains a Himalaya clause. The Himalaya clause extends the COGSA liability limitation to others used by ICC to perform any of its obligations, including independent contractors:

> These conditions apply whenever claims relating to the performance of the contract evidenced by this [bill of lading] are made against any servant, agent or other person (including any independent contractor) whose

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[3] A Clause Paramount, or "period of responsibility" clause, extends COGSA coverage beyond the "tackle to tackle" limitation embedded in the statute's definition of "carriage of goods." *See* 46 U.S.C. app. § 1301(e); *accord id.* § 1307 (authorizing extensions of COGSA).

> services have been used in order to perform the contract, whether such claims are founded in contract or in tort, and the aggregate liability of the Freight Forwarder and of such servants, agents or other persons shall not exceed the limits in [the Clause Paramount].

Pet. App. 59a (ICC bill ¶ 10.1).

The next clause of the FBL is equally significant in setting out the rights and responsibilities of those who would play a role in the shipment of Kirby's goods. That clause, 10.2, recognizes that "[i]n entering into this contract . . . , the Freight Forwarder, to the extent of these provisions, does not only act on his own behalf, but also as agent or trustee for such persons, and such persons shall to this extent be or be deemed to be parties to this contract." Pet. App. 59a-60a (ICC bill ¶ 10.2); Ramberg, *supra*, at 67. Thus, by its very terms, the FBL purported to make all subcontractors "used in order to perform the contract" parties to the ICC contract of carriage. See Pet. App. 59a; Ramburg, *supra*, at 66.

Because it was not in the business of actually transporting goods, ICC subcontracted with Hamburg Sud, an ocean carrier based in Germany, for the carriage of the machinery from Sydney to Huntsville. As is typical in such transactions, Hamburg Sud issued it own bill of lading (the "Hamburg Sud bill") to ICC, which was named as the "shipper/exporter." Like the ICC FBL, the Hamburg Sud bill similarly identified the Queensland Star as the vessel, Sydney as the port of loading, Savannah as the port of delivery, and Huntsville as the destination of the machinery. Pet. App. 66a. The Hamburg Sud bill imposes numerous obligations (including liability for payment and performance) upon the "Merchant," defined broadly to include "the shipper, consignee, receiver, holder of this Bill of Lading, *owner of the cargo* or person entitled to the possession of the cargo and the servants and agents of any of these." *Id.* at 61a (Definitions (e)) (emphasis added). The bill obligates Hamburg Sud to provide through transportation to the inland destination, "which may well involve transport by rail," and authorizes the carrier to "sub-contract on any terms the whole or any part of the carriage" of the goods. *Id.* at 61a, 62a (Hamburg Sud bill §§ 4, 5a).

The Hamburg Sud bill of lading likewise contained a Clause Paramount, limiting Hamburg Sud's liability under the agreement to $500 per container, absent declaration by ICC of a greater value for the goods (a declaration that ICC, following the course chosen by Kirby, did not make). Finally, the Hamburg Sud bill of lading included its own Himalaya clause, which extended the liability limitations to additional parties that would be used to carry out the contract of carriage:

> [A]ll exemptions, limitations of, and exonerations from liability provided by law or by the Terms and Conditions hereof shall be available to all agents, servants, employees, representatives, all participating (including inland) carriers and all stevedores, terminal operators, warehousemen, crane operators, watchmen, carpenters, ship cleaners, surveyors and all independent contractors whatsoever . . . .

Pet. App. 63a (Hamburg Sud bill ¶ 5(b)).

Hamburg Sud transported the machinery from Sydney to Savannah, Georgia on one of its ships. At Savannah, the containers were transferred to petitioner Norfolk Southern, which had been hired by the American arm of Hamburg Sud to transport the goods via train to their final destination in Huntsville, Alabama. The train carrying the containers derailed, allegedly causing $1.5 million in damage to the machinery. Kirby was thereafter reimbursed for its loss by its insurer, MMI.

Kirby and MMI filed suit against Norfolk Southern in the United States District Court for the Northern District of Georgia, bringing claims sounding in negligence and breach of contract for the full amount of the damage caused to its machinery by the derailment. Norfolk Southern moved for

partial summary judgment on the basis that its liability, if any, was no greater than the $500 per package COGSA limitation. The district court granted the motion, concluding that the Himalaya clause in the Hamburg Sud bill of lading, which by its terms encompassed "inland carriers," covered Norfolk Southern and limited the railroad's potential liability to Kirby to $500 per container. See Pet. App. 36a-37a. The district court rejected the plaintiffs' argument that Kirby could not be bound to the agreement entered into by ICC with Hamburg Sud: "One who contracts with others to make arrangements for the transportation of his goods is bound by the terms of the contract entered into on his behalf." *Id.* at 37a (citing *Great No. Ry.* v. *O'Connor*, 232 U.S. 508 (1914)). In reaching its holding, the district court emphasized that the Hamburg Sud bill was a "'through bill'" covering transport of Kirby's goods through to Huntsville. See *id.* at 35a. Further, the court rejected plaintiffs' argument that Norfolk Southern was too far removed contractually from the shipper to enjoy the protections set forth in the Hamburg Sud bill of lading. See *id.* at 34a-35a. Finally, as part of its holding, the district court also found plaintiffs' state law claims to be preempted by the COGSA regime. See *id.* at 37a.

The parties jointly requested that the case be certified for interlocutory appeal because of the existence of a conflict among the circuits on the question whether a subcontractor must be in privity with the issuer of the relevant bill of lading in order to enjoy its liability protections. The district court granted their request and certified the case to the Eleventh Circuit pursuant to 28 U.S.C. § 1292(b), and that court granted review. Pet. App. 25a, 6a.

Decision of the Court of Appeals

A divided panel of the Eleventh Circuit reversed. Pet. App. 2a. The court first addressed the question whether Kirby was bound by the Hamburg Sud bill of lading, which extended the COGSA liability limitation in its Himalaya clause to "inland carriers" used to transport Kirby's machinery. The court did

not dispute that Norfolk Southern was covered by the plain terms of the Hamburg Sud bill's Himalaya clause. See *id.* at 6a. The court of appeals held, however, that Kirby would only be bound by the Hamburg Sud bill if ICC was acting as Kirby's agent when it received the bill. See *id.* at 7a. Noting that "freight forwarders 'may act as agents or as principals, depending on the facts,'" *id.*, the court drew a distinction between situations in which the forwarder merely arranges for a contract between the cargo owner and ocean carrier, but does not enter into any contract of carriage itself, and those in which the forwarder issues its own bill of lading to the cargo owner and collects payment on the same. In the latter case, where the forwarder contracts on its own for transport of the cargo, it held, the forwarder acts not as an agent of the cargo owner, but as its own principal. In the Eleventh Circuit's view, "[i]f ICC had been acting as Kirby's agent, there would have been only one bill of lading, issued by Hamburg Sud to Kirby and listing Kirby as the shipper." *Id.* at 7a-8a.

The court of appeals next held that Norfolk Southern was not protected by the Himalaya clause in the ICC FBL because "the law requires privity between the carrier and the party seeking shelter in the Himalaya clause." Pet. App. 14a. The court held that in the absence of such privity, as here (Norfolk Southern having not contracted directly with ICC), the downstream carrier may not enjoy the protections of the Himalaya clause. See *id.* at 13a. The Eleventh Circuit expressly recognized that on this question it was parting company with the Ninth Circuit, which has rejected the contention that privity of contract is required in order to benefit from a Himalaya clause. See *id.* The Ninth Circuit test instead focuses on "'the nature of the services performed [by the defendant who seeks to invoke the clause] compared to the carrier's responsibility under the carriage contract,'" *id.* (quoting *Akiyama Corp.*, 162 F.3d at 574 (alterations in original)), a test that would dictate a different outcome here.

Judge Siler dissented on both issues. First, he noted that the "bill of lading between Kirby and ICC put Kirby on notice that ICC would have to employ other entities to transport the freight." Pet. App. 19a. It was of no moment, Judge Siler observed, that two different bills of lading governed the relevant cargo, for Kirby had "declined the opportunity to obtain full liability coverage" in its contract with ICC and elected instead to agree to the COGSA limitation incorporated therein and insure its cargo elsewhere. *Id.* Judge Siler ultimately concluded that because Kirby fully expected and knew that ICC would contract with other carriers to ship the cargo, ICC could only have been acting as agent for Kirby in making those arrangements. See *id.*

Second, Judge Siler concluded that Norfolk Southern should in any event enjoy the protections of the Himalaya clause in the ICC bill of lading, which covers "independent contractors" without qualification. Noting again that "Kirby knew that an inland carrier would have to be used" in order to transport the goods to Huntsville, the dissent opined that Kirby must have "agreed to a limitation of liability for the carrier" that would accomplish the last leg of the journey. Pet. App. 19a. That sufficed to bring Norfolk Southern within the scope of the clause. Embracing what he viewed as the better rule of the Ninth Circuit, Judge Siler saw the majority's holding as giving a "windfall" to Kirby's insurer based on a "technicality," all the while ignoring both that "Kirby knew from the start that the ultimate destination would have to be through an inland carrier" and it "agreed to the limitation of liability on the part of ICC and all of its sub-contractors." *Id.* at 20a.

REASONS FOR GRANTING THE PETITION

Review by this Court of the decision of the Eleventh Circuit is necessary to ensure the proper and uniform resolution of two important questions regarding carrier liability in international shipping transactions. In conflict with the

precedents of multiple courts of appeals and of this Court, and with what is understood as the "commercial norm" in this context, the Eleventh Circuit below held that a freight forwarder does not act as agent on behalf of a cargo owner when it arranges transport of the cargo. Its decision disrupts the carefully calibrated liability regime set forth in COGSA and will create extraordinary inefficiencies by placing upon carriers the burden of contracting for COGSA's liability limitations with every party holding a conceivable interest in the goods being transported.

This case also squarely presents the controversy whether privity of contract is necessary to enjoy the protections of a Himalaya clause in a bill of lading that otherwise purports to extend liability limitations to downstream carriers or other subcontractors. On this question, the Eleventh Circuit's decision deepens a split among the maritime circuits and, if permitted to stand, will allow a cargo owner, who agreed to the liability limitation in question and whose expectations did not turn on the identity of those carriers that actually transport its cargo, to obtain a windfall at the hands of a carrier that believed itself to be secure against just such a judgment.

In short, if left unreviewed, the decision below will have a dramatic effect on international shipping agreements and import considerable uncertainty into the allocation of risk in such agreements. The result – checkerboard liability schemes that COGSA and Himalaya clauses are supposed to obviate – will likewise lead to forum shopping and over-insurance by parties to shipping transactions. The Court should grant certiorari to resolve these conflicts among the circuits and reject the Eleventh Circuit's position on each question.

I. THIS COURT SHOULD RESOLVE THE CONFLICT OVER WHETHER A FREIGHT FORWARDER THAT CONTRACTS WITH A CARGO OWNER TO TRANSPORT GOODS IS THE OWNER'S AGENT IN CONTRACTING WITH VESSEL CARRIERS.

The decision of the court of appeals creates a conflict of authority among three of the primary circuits with maritime jurisdiction on the recurring issue of whether a freight forwarder, hired to provide international transportation of cargo, acts as an agent on behalf of the cargo owner when it enters into contracts of carriage with vessel carriers, thereby binding the cargo owner to the terms of that contract. The Eleventh Circuit's decision disrupts the settled expectations of carriers and strips them of the very protections COGSA and Himalaya clauses were designed to give them.

a. On one side of the legal divide are those courts of appeals that, in conflict with the Eleventh Circuit, hold the forwarder to be acting in the role of agent on behalf of the cargo owner when it deals with the carrier that will actually transport the cargo. These courts recognize the "commercial norm" that forwarders behave as agents in this role and note that any other conclusion would be at odds with the purpose of COGSA, which was intended to give carrier parties to international shipping transactions predictable and limited liability exposure.

In *Kukje Hwajae Insurance Co.* v. *M/V Hyundai Liberty*, 294 F.3d 1171 (9th Cir. 2002), the Ninth Circuit held that the cargo owner was bound by the forum selection clause included in a bill of lading issued by the vessel carrier to a freight forwarder that (like ICC here) is a "non-vessel operating common carrier" ("NVOCC"),[4] even though the

[4] NVOCC is a term of art in maritime commerce referring to a freight forwarder that offers transportation for hire and assumes liability for the safe transportation of the goods as a carrier. It does not operate vessels,

cargo owner was not a party to that bill of lading, and even though the freight forwarder had issued separate bills of lading to the cargo owner. The Ninth Circuit held that the freight forwarder was "acting as [the cargo owner's] agent when it accepted the [vessel carrier's] bill of lading." *Id.* at 1175. The Ninth Circuit observed that it is the "commercial norm" for parties to maritime shipping arrangements to treat the middleman "as the agent of the cargo owner/shipper when it contracts with the ocean carrier to ship the cargo owner's goods." *Id.* at 1176 ("[b]oth commentators and courts have recognized" this principle); *accord Morrow Crane Co.* v. *Affiliated FM Ins. Co.*, 885 F.2d 612, 614-15 (9th Cir. 1989). Thus, the cargo owner would be bound by the terms of the bill of lading issued by the carrier to the freight forwarder. See *Kukje*, 294 F.3d at 1177.

In an earlier decision, the Ninth Circuit similarly recognized the liability limitation enjoyed by carriers under COGSA should not be applied only against parties with which the carriers directly contract. See *Carman Tool & Abrasives, Inc.* v. *Evergreen Lines*, 871 F.2d 897 (9th Cir. 1989). Adopting a different rule would "place far too heavy a burden on the carriers," for a carrier "would not only be required to bring the liability limitation to the attention of the party it actually deals with, but also to other parties that it knows, or should know, have an economic interest in the goods being shipped." *Id.* at 900. This, the court held, is "precisely the type[] of problem[] that COGSA was designed to prevent." *Id.* at 901 (citing Sturley, *Part II*, at 161 & nn. 208-211). Thus, where a shipper who declines to declare a

but instead consolidates small shipments and arranges transportation in its own name with vessel carriers. *Kukje*, 294 F.3d at 1175-76; *Insurance Co. of N. Am.* v. *S/S Am. Argosy*, 732 F.2d 299, 301 & n.2 (2d Cir. 1984); 46 U.S.C. app. § 1702(17)(B) (Shipping Act) (so defining NVOCC and using "ocean freight forwarder" in the narrow sense of an intermediary that merely dispatches shipments for others). ICC, like any freight forwarder issuing an FBL and assuming liability as a carrier, is an NVOCC.

greater value for its goods at the time of arranging for shipment and chooses to insure them instead against damage or loss, it will be bound by that choice, even against parties with whom it did not contract directly. See *id.* Indeed, the Ninth Circuit recognized that the shipper's insurer in that case, as here, was suing "in an attempt to shift . . . the burden of a loss it was paid to insure." *Id.* at 901 n.10.

Like the Ninth Circuit, the Second Circuit has squarely adopted a position on the agency question that is in conflict with the Eleventh Circuit. In *Stolt Tank Containers, Inc.* v. *Evergreen Marine Corp.*, 962 F.2d 276 (2d Cir. 1992), the Second Circuit held that the owner of damaged containers was subject to the liability limitations contained in a bill of lading issued by the carrier to an intermediary without reference to the owner. See *id.* at 279-80. The court of appeals rejected the owner's argument that it could not be bound by a contract to which it was not a party. Instead, "where a party is aware that another is shipping its packages aboard a vessel and has at least constructive notice that liability limitations might apply, that party is bound by the liability limitations agreed to by the shipper." *Id.* at 280. That court observed that "[a] contrary interpretation would defeat COGSA's intended purposes of allocating risk of loss and creating predictable liability rules on which not only carriers but others can rely." *Id.* at 279. In the Second Circuit's view, the Eleventh Circuit's rule would mean that "a carrier, to avoid expanded liability, would have to contract to limit liability not only with the party with whom it actually dealt, but also with all others who might possess an interest in the shipped goods." *Id.*

Other decisions of the Second Circuit are in accord. *Insurance Co. of North America* v. *S/S American Argosy*, 732 F.2d 299 (2d Cir. 1984), similarly involved a freight forwarder that (like ICC) was an NVOCC. Deeming the freight forwarder "a hybrid," the Second Circuit noted that with respect to the cargo owner, the forwarder acts as a

carrier, but "[w]ith respect to the vessel and her owner" it acts as "an agent of the shipper." *Id.* at 301. The *Argosy* court held that the vessel carrier's liabilities to the cargo owner would be determined based upon the terms of its bill of lading issued to the freight forwarder, and not the separate bill of lading issued by that party to the cargo owner (which, in *Argosy*, set forth a higher cap on the carrier's potential liability). In doing so, the Second Circuit recognized that viewing the forwarder as anything other than an agent for the cargo owner would require carriers to undertake greater measures to protect themselves in contracts of carriage – an outcome that would "increase the cost of shipping substantially" and stand at odds with Congress's intentions in passing COGSA. *Id.* at 304.[5]

The Third and First Circuits recognize the same rule as the Ninth and Second Circuits. The Third Circuit, for example, has noted that under COGSA, the carrier treats the forwarder as the agent of the cargo owner (or true customer), although the cargo owner treats the forwarder as a carrier. See *SPM Corp.* v. *M/V Ming Moon*, 22 F.3d 523, 527 (3d Cir. 1994). Indeed, in a COGSA case, the Third Circuit relied on the Second Circuit's decision in *Argosy* for the proposition that a

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[5] More recently, in *Nippon Fire & Marine Insurance Co.* v. *Skyway Freight Systems, Inc.*, 235 F.3d 53 (2d Cir. 2000), the Second Circuit reaffirmed the background federal common law principles that inform its reading of COGSA. In *Nippon Fire*, the cargo owner did not sue the primary air carrier with whom it contracted (and which had gone bankrupt) in order to bring tort claims against two secondary air carriers. The court of appeals held that (a) the cargo owner could not bring tort claims against the secondary carriers, but instead only claims for breach of contract, and (b) the cargo owner would be bound by the terms of the contracts entered into between the primary and secondary carriers, including liability limitations contained therein. "[C]ommon carriers," it held, "are entitled to assume 'that one presenting goods for shipment either owns them or has authority to ship them,'" and therefore the primary carrier is the "agent" of the shipper in contracting with secondary carriers. *Id.* at 61.

shipper will be bound by the liability limitation in a bill of lading issued by a downstream carrier to a carrier directly engaged by the shipper, because in contracting with the downstream carrier, the primary carrier "was acting as an agent for . . . the shipper." *SPM Corp.*, 965 F.2d at 1305 n.9.

In *Puerto Rico Maritime Shipping Authority* v. *Crowley Towing & Transportation Co.*, 747 F.2d 803 (1st Cir. 1984), the First Circuit was faced with determining whether a carrier would be protected by the terms of a contract of carriage into which it entered with a lessee of goods, or instead could be sued by the owner of the goods for full damages. That court determined that it would be improper to penalize the carrier for following the instructions of the lessee, because "[a] carrier ordinarily need not investigate the ownership of the goods that it ships." *Id.* at 804. Instead, in the First Circuit's view, carriers, whether common or private, "can assume that one presenting goods for shipment either owns them or has authority to ship them." *Id.* at 804-05. Although the case did not involve COGSA, the First Circuit's reasoning is equally pertinent here: Hamburg Sud was within its rights to assume that ICC had authority to deal on behalf of Kirby, and Kirby should not be permitted to run from the bargain struck by what was effectively its agent in dealing with Hamburg Sud – particularly where the terms of the agreements were, with respect to the liability limitations of carriers, identical.[6]

Taken together, these cases establish that the majority of the courts of appeals to have addressed the issue recognize the "commercial norm" that forwarders, like ICC, act as agents on behalf of the cargo owners who engage them. Correspondingly, carriers are within their rights under COGSA to rely upon the liability protections that they include

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[6] District court decisions are in accord. *See, e.g., Pearson* v. *Black King Shipping Co.*, 769 F. Supp. 940, 946 (E.D. Va. 1991); *Jockey Int'l* v. *M/V "Leverkesen Express"*, 217 F. Supp. 2d 447, 456-57 (S.D.N.Y. 2002).

when issuing bills of lading not just to cargo owners directly, but to forwarders as well. Under these decisions, Kirby would be bound by the terms of the Hamburg Sud bill of lading to which its agent, ICC, agreed. Norfolk Southern, in turn, would enjoy the protections extended to it in the that bill of lading, including COGSA's $500 per package liability limitation. Pet. App. 63a-64a (Hamburg Sud bill).

b. In conflict with these decisions, the Eleventh Circuit's decision below stands alone. The other courts of appeals directly reject the Eleventh Circuit's holding that when a freight forwarder acts as a carrier and issues its own bill of lading to the cargo owner, the freight forwarder is not the agent of the cargo owner in contracting with vessel carriers to transport the goods. Pet. App. 10a.

The decision below is also in square conflict with this Court's decision in *New Jersey Steam Navigation Co.* v. *Merchant's Bank*, 47 U.S. (6 How.) 344 (1848). In that case, one William Harnden "was engaged in the business of carrying for hire small packages of goods . . . for any persons choosing to employ him" between Boston and New York. *Id.* at 379. He contracted in his own name with the owner of steam vessels to carry a crate containing his shipments at a monthly rate, and that contract provided that the crate was carried at Harnden's risk and that the vessel owners assumed no risk of loss of the goods. See *id.* Harden separately contracted with certain banks to transport specie from New York to Boston. See *id.* The vessel sank, and the banks brought a libel *in personam* against the vessel owners.

This Court held that even though Harnden was a carrier in relation to the banks, and even though the banks were not a party to Harnden's contract with the vessel owners, the banks would still be an undisclosed principal to that contract. See *id.* at 380. The Court noted that the banks were the real owners of the property, and that a carrier has a lien against the property but no right of possession against the owner. *"[T]he carrier . . . is considered in law the agent or servant of the*

owner, and the possession of the agent is the possession of the owner." *Id.* at 380 (emphasis added). Accordingly, "the contract between Harnden and the [vessel owners] for the transportation of the specie was, in contemplation of law, a contract between them and the [banks]; and although made in his own name, and without disclosing his employers at the time, a suit may be maintained directly upon it in their own names." *Id.* This Court went on to hold that the contractual limitation of the vessel owner's liability was binding on the cargo owners. See *id.* at 382-84; see also *Chicago, Milwaukee, St. Paul & Pac. R.R.* v. *Acme Fast Freight, Inc.*, 336 U.S. 465, 488 n.27 (1949) (applying *New Jersey Steam* rule to declare that "the shipper is the undisclosed principal of its agent, the forwarder, in the latter's contract with the carrier").

Other decisions of this Court embrace the same principles. In *Great Northern Railway* v. *O'Connor*, 232 U.S. 508 (1914), for example, this Court held that a cargo owner was bound to the terms of an agreement entered into by her forwarder without her knowledge with the railroad that transported her personal effects. See *id.* at 514-15; see also *id.* ("If there was any undervaluation, wrongful classification or violation of her instructions, resulting in damage, the plaintiff has her remedy against that [forwarding] Company.").[7] The Eleventh Circuit's decision is, in short, irreconcilable not only with the decisions of other courts of appeals, but also with longstanding precedent of this Court.

c. The ramifications of the decision below are breathtaking. In the age of containerization, it is standard practice for a forwarder to issue a bill of lading to its

[7] In its most recent treatment of a COGSA case, moreover, this Court enforced a forum selection clause in a bill of lading against a subrogee of the cargo owner, who was not a named party of the bill of lading in question. *See Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 530-32, 538 (1995).

customers in its own name, consolidate shipments to gain a full container rate, and then contract separately with a vessel carrier to transport the cargo under the vessel carrier's bill of lading. Under the Eleventh Circuit's view, no vessel carrier will be able to enforce its own bill of lading (including Himalaya clauses) against the owner of the goods. The vessel carrier (and any downstream carriers, agents, or contractors entitled to rely on its bill) will be deprived of the necessary certainty as to its rights, immunities, and duties under the bill of lading vis-à-vis the owners of the goods it carries. There is, moreover, no way for the vessel carrier to protect itself; in international shipping transactions, "the ocean carrier may have no idea that the party to whom it issues its bill is in fact an NVOCC that has issued bills of lading itself." Martin Davies, *In Defense of Unpopular Virtues: Personification and Ratification*, 75 Tul. L. Rev. 337, 396 (2000). The decision below upsets settled expectations and business practices. Indeed, consistent with the authorities outlined above, and as reflected in the Hamburg Sud bill of lading that expressly binds the cargo owner, *supra* at 8-9, it has long been commonly understood that the freight forwarder "contracts with the ocean carrier as agent for the owners of the goods," Davies, *supra*, at 396.

The decision below does more than nullify the force of the vessel carrier's bill of lading against the owner of the goods; it undermines COGSA itself. As noted above, *supra* at 3-5, COGSA, like the Harter Act before it, "regulates the terms of ocean carriage by the indirect but highly efficacious device of dealing with the terms of the ocean bill of lading," Gilmore & Black, *supra*, § 3-25, at 145. If the ocean bill of lading issued to a freight forwarder is unenforceable against the cargo owner, the real party-in-interest, all of the mandatory rules of COGSA (including the liability limitations) are negated. Here, the transaction was structured so that ICC would be a "carrier" entitled to invoke the protections of COGSA. See 46 U.S.C. app. §§ 1301, 1304(5); *Sabah Shipyard Sdn. Bhd.*

v. *M/V Harbel Tapper*, 178 F.3d 400, 404-05 (5th Cir. 1999) ("COGSA's liability limit applies only to 'carriers'" and where forwarder does not enter into contract of carriage with shipper, it does not fall within COGSA's ambit). To hold that ICC's designation as a carrier deprives the true vessel carriers of COGSA's protections is to turn the statute on its head. COGSA is expressly drafted to cap the liability of the carrier and ship against all claimants, regardless of which entity is named in the bill of lading. See 46 U.S.C. app. § 1304(5) ("Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package . . . .").

Finally, the Eleventh Circuit's ruling grants a windfall to a shipper and its insurer, each of which accounted for the liability limitation in setting their expectations. As one commentator has written of this situation:

> The underwriter has already reimbursed the shipper for the loss pursuant to their insurance agreement. This is exactly what they contemplated when the shipper chose to insure the goods rather than to declare their value, and when the underwriter collected its premium to compensate it for bearing the risk that the goods would be lost or damaged. After the loss, the insurer, who collected a premium, seeks to recover from the carrier, who did not collect a premium, and who thought it was entitled to treat the goods as though they were worth only $500 per package.

Sturley, *Part II*, at 180-81 (footnote omitted).

As the district court ruled, the Himalaya clause of the Hamburg Sud bill, which expressly protects inland carriers as well as "all independent contractors whatsoever," Pet. App. 63a, clearly covers Norfolk Southern. By concluding that ICC was not acting as Kirby's agent when it contracted with Hamburg Sud to transport Kirby's goods, the Eleventh Circuit

adopted a position that cannot be reconciled with general maritime practices, settled common law rules, and the logic behind COGSA, which was intended foremost to give carriers predictable and limited liability exposure. The decision below squarely presents this conflict over the role of forwarders in international shipping transactions, and it provides an ideal vehicle for resolving this dispute.

II. THIS COURT SHOULD RESOLVE THE CONFLICT OVER WHETHER PRIVITY OF CONTRACT IS REQUIRED FOR A PARTY TO BENEFIT FROM A "HIMALAYA CLAUSE" USED IN A CARRIER'S BILL OF LADING.

The Eleventh Circuit also held that Norfolk Southern could not invoke the protections of the Himalaya clause of the ICC bill, which extends the COGSA liability limitations to "any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract." Pet. App. 59a. The court of appeals ruled that, in construing relational terms like "independent contractors" in the Himalaya clause, "the law requires privity between the carrier and the party seeking shelter in the Himalaya clause." *Id.* at 13a, 14a. As the court below recognized, see *id.* at 13a, its decision departs from the rule stated by the Ninth Circuit, which "reject[s] [the cargo owner's] argument that privity of contract is required in order to benefit from a Himalaya clause," *Akiyama Corp.*, 162 F.3d at 574. By subscribing to the contractual privity rule, the Eleventh Circuit joined the Second Circuit, see *Mikinberg* v. *Baltic S.S. Co.*, 988 F.2d 327, 333 (2d Cir. 1993), thereby exacerbating the already existing conflict of authority between the courts of appeals that had been recognized by the district court and both parties below; Pet. App. 24a; see Appellants' Principal Br. at 40-44, *Kirby* v. *Norfolk S. Ry.*, 300 F.3d 1300 (11th Cir. filed Aug. 27, 2001) (No. 01-13776); Brief for Appellee at 40-42, *id.*

a. In *Akiyama*, the relevant Himalaya clause extended the COGSA $500 liability limitation to "'[e]very servant, agent,

and sub-contractor,'" and further defined the term "Subcontractor" to include stevedores and terminal operators. 162 F.3d at 573 (alteration in original). When goods were damaged during stevedoring operations, the cargo owner and its insurer sued, among others, a stevedoring company. The stevedoring company was not in privity of contract with the carrier that issued the bill of lading, but was instead the sub-sub-contractor of the carrier (just as Norfolk Southern was the sub-sub-contractor of ICC in this case). See *id.* at 573-574. Acknowledging that in a previous decision it had looked to the contractual relation of the defendant and the carrier as one of the factors in interpreting Himalaya clauses, see *Mori Seiki USA, Inc.* v. *M.V. Alligator Triumph*, 990 F.2d 444, 450 (9th Cir. 1993), the Ninth Circuit nonetheless squarely rejected the contention that a subcontractor must be in contractual privity with the carrier that issues the relevant bill of lading to receive the benefit of the bill's Himalaya clause. *Akiyama*, 162 F.3d at 574. Instead, the court of appeals concluded, "the proper test is to consider 'the nature of the services performed [by the party seeking protection of the Himalaya clause] compared to the carrier's responsibility under the carriage contract.'" *Id.* at 574 (quoting *Taisho Marine & Fire Ins. Co.* v. *Vessel Gladiolus*, 762 F.2d 1364, 1367 (9th Cir. 1985)). Because stevedoring services were within the scope of the carrier's responsibility, the Ninth Circuit deemed the stevedore a beneficiary of the contract's protections. See *id.* at 573. That court reasoned that if the terminal operator and stevedore were excluded from coverage, "'the Himalaya Clause would be rendered extraordinarily empty.'" *Id.* at 574 (quoting *Institute of London Underwriters* v. *Sea-Land Servs., Inc.*, 881 F.2d 761, 767 (9th Cir. 1989)). Under the Ninth Circuit's comparison-of-services test, there is no question that Norfolk Southern would be protected by the ICC bill's Himalaya clause. ICC assumed responsibility to transport Kirby's goods from Sydney to Huntsville, *supra* at 6-7, and the inland carriage services from Savannah to Huntsville

performed by Norfolk Southern clearly "are services that are [ICC's] responsibility." *Akiyama*, 162 F.3d at 574.

b. In square conflict with the Ninth Circuit, the Second and Eleventh Circuits have held that privity of contract is a requirement for third parties to benefit from Himalaya clauses of this kind. The court below rejected *Akiyama*'s analysis and the Ninth Circuit's position. Pet. App. at 13a. ("We recognize that the Ninth Circuit has arguably taken a different view."). Whereas the Ninth Circuit held that the applicability of a Himalaya clause referring to a "subcontractor" of the carrier would be resolved by the comparison-of-services test without regard to privity of contract, see *Akiyama*, 162 F.3d at 574, the Eleventh Circuit expressly stated that the "Ninth Circuit comparison-of-services rule" could not be applied to an independent contractor of the carrier unless there was privity of contract, Pet. App. 13a n.10.[8] The Second Circuit, in a

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[8] The Eleventh Circuit characterized the Ninth Circuit's rule as "arguably" different from its own based on how the Eleventh Circuit would handle a reference in a Himalaya clause to "stevedores." The Eleventh Circuit clarified the scope of its privity rule: "Privity is required where, as here . . . , the category term being interpreted in the clause is relational, such as 'agent,' 'servant,' or 'independent contractor.' Where, on the other hand, the term [used in the Himalaya clause] is descriptive such as 'stevedore,' 'terminal operator,' etc., privity of contract is not required." Pet. App. 14a n.11. According to the Eleventh Circuit, "the result, though not the language, of *Akiyama* conforms to this rule." *Id.*

The Eleventh Circuit's discussion misconceives both the facts and analysis of *Akiyama*. First, the Himalaya clause in *Akiyama* referred only to "subcontractors," and then in a separate definitional clause defined that term to include "stevedores." *See* 162 F.3d at 573. On the facts of *Akiyama*, a court would still have to resolve whether the term "subcontractors" in the Himalaya Clause referred only to subcontractors in privity with the carrier that issued the bill of lading, or all subcontractors performing carriage services. Second, the Eleventh Circuit mischaracterized the *Akiyama* court's express rejection of the privity requirement as "dicta" because it contradicts the rule established in the Ninth Circuit's earlier decision in *Mori Seiki*. Pet. App. 14a-15a. The Eleventh Circuit failed to heed that the *Akiyama* court expressly analyzed *Mori Seiki* before

series of cases involving Himalaya clauses extending liability limitations to "independent contractors," has likewise enforced the privity-of-contract rule. See *Mikinberg*, 988 F.2d at 333 (discussing cases).[9]

Given the common usage of Himalaya clauses extending COGSA liability to "independent contractors" and "subcontractors," it is vital that this Court resolve the conflict of authority and establish a uniform rule to apply to Himalaya clauses. This Court's intervention is all the more critical now that the Eleventh Circuit has applied the privity-of-contract rule to the standard Himalaya clause in the FBL, the most widely used shipping document in international multimodal transport. See *supra* at 6. Incredibly, under the Eleventh Circuit's rule, only a person in privity of contract with the freight forwarder who issues the FBL is protected by the Himalaya clause. Commonly, the freight forwarder will, as here, be in privity only with the initial carrier. The Eleventh Circuit's rule means that the Himalaya clause will not cover

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it stated the rule of decision (not dictum) that privity of contract was not required. *See Akiyama*, 162 F.3d at 573-74. Regardless, the Eleventh Circuit acknowledges that it applies a different rule than does the Ninth Circuit, and those conflicting rules would yield a different result on the facts of this case.

[9] Other circuits have weighed in on this issue, albeit without exploring it in any great detail. The Fifth Circuit, for example, has stated that it "requires privity of contract of carriage before liability under COGSA arises." *Thyssen Steel Co.* v. *M/V Kavo Yerakas*, 50 F.3d 1349, 1353 (5th Cir. 1995); *accord Gebr. Bellmer Kg.* v. *Terminal Servs. Houston, Inc.*, 711 F.2d 622, 625 (5th Cir. 1983) (including stevedores hired as independent contractors by the carrier's agent within reach of Himalaya clause). Discussion in the caselaw of the Third and First Circuits also highlights the confusion in the lower courts on this issue. *See, e.g., SPM Corp.*, 965 F.2d at 1305 n.9 (suggesting that contractual privity alone is insufficient for a Himalaya clause to extend protection to third party); *EAC Timberlane* v. *Pisces, Ltd.*, 745 F.2d 715, 719 (1st Cir. 1984) (opining that COGSA applies only to carriers or other parties who have "entered into a contract of carriage with the shipper or ha[ve] some privity of contract with the shipper").

any of the other carriers and other contractors who will perform the actual transportation of the goods to their ultimate destination, including subcontracting ocean carriers,[10] stevedores, terminal operators, and inland carriers of any kind (by air, water, road or rail). This is simply an untenable construction of a through bill of lading for multimodal transport to overseas inland destinations.

The plain language of the FBL refutes the Eleventh Circuit's implausible construction of the Himalaya clause, and underscores the impropriety of its privity-of-contract rule. First, the Himalaya clause in Clause 10.1 of the ICC bill by its terms extends liability to "any servant, agent *or other person (including any independent contractor) whose services have been used in order to perform the contract*." Pet. App. 59a (ICC ¶ 10.1). Because independent contractors are a subset of persons whose services are used to perform the contract, it makes no sense to restrict the term "independent contractors" further to cover only those contractors in privity with the freight forwarder. Further, Clause 10.2, referring to the "persons" identified in section 10.1, provides that "[i]n entering into this contract . . . , the Freight Forwarder, to the extent of these provisions, does not only act on his own behalf, but also as agent or trustee for such persons, and such persons shall to this extent be or be deemed to be parties to this contract." *Id.* at 59a-60a (ICC bill ¶ 10.2). This clause "is primarily intended for systems of law which require a contract to give other persons than the carrier himself the

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[10] For example, it is increasingly prevalent for large vessel operators to share space on one another's vessels, yet each operator continues its own marketing operations and books cargo in its own name, servicing its own customers even though only one party will handle the physical carriage. The party handling actual carriage will then engage the additional subcontractors needed to complete all of the carriage operations. Thus, many of the operators who benefit from the shared space arrangement will have no privity of contract to the subcontractors who complete the carriage. *See generally* Mary T. Reilly, *Identity of the Carrier: Issues under Slot Charters*, 25 Tul. Mar. L.J. 505, 513-16 (2001).

benefit of limitation of and exemption from liability (the so-called doctrine of privity of contract)." Ramberg, *supra*, at 67. It would be passing strange if the FBL, having eliminated the requirement of privity with the shipper in 10.2, had required privity with the carrier in 10.1. Finally, Clause 10.1 uses parallel language to Clause 2.1's definition of the persons for whose acts the freight forwarder assumes liability, Pet. App. 55a, 59a, and it is indisputable that such liability extends to the acts of all service providers, not just those in privity with the freight forwarder, see Ramberg, *supra*, at 51 (freight forwarder "cannot avoid a liability for such other persons by referring to his status as an intermediary"). The Eleventh Circuit's wooden privity-of-contract rule is irreconcilable with the plain meaning of the FBL.

The decision below undermines the economic basis of international shipping transactions under the FBL and destroys reliance interests. Under the FBL, the cargo owner knows the extent of the liability of those performing services under the contract of carriage, and it can obtain favorable shipping rates by accepting those limitations, insuring for the balance. Pet. App. 59a (FBL ¶ 10.1) (the "aggregate liability of the Freight Forwarder and of such servants, agents or other persons shall not exceed the limits in clause 8"). On the other end of the transaction, carriers and others can undertake to provide services connected to the transportation of goods under the bill of lading without risk of indeterminate liability. There is no sound economic basis for a privity-of-contract rule; the cargo owner's expectations and decisions do not in any sense depend on whether the freight forwarder performs its contract of carriage by subcontractors or sub-subcontractors. The Eleventh Circuit simply gives cargo owners and insurers a "windfall" by allowing them to prevail on a "technicality" of an implied-in-law privity rule that undercuts the force of the agreement under which all the relevant carriers reasonably assumed they were protected. *Id.* at 20a (Siler, J., dissenting).

The Eleventh Circuit therefore has struck a double blow against carriers and other service providers in international commerce. In conflict with the precedents of other courts of appeals and of this Court, it has wrongly held that a vessel carrier's bill of lading issued to a freight forwarder in its own name (including its Himalaya clause) is unenforceable against the cargo owner, and then invoked a privity-of-contract rule to deny such entities the protections of FBL Himalaya Clauses to which they are clearly entitled. Such conflicts "are precisely the type most likely to be intolerable, because litigants can easily exploit them through forum shopping." Sturley, *Observations*, at 1268 (discussing COGSA); see *id.* at 1270-71 (noting also that lack of uniformity causes parties to shipping arrangements to over-insure). This case squarely presents two critical and independent issues on which the courts of appeals are divided in an area of law where consistency is vital. Indeed, "[t]he need for uniformity is so great that it would generally be better for the [Supreme] Court to resolve a conflict incorrectly . . . than to allow the conflict to stand." *Id.* at 1275. Review by this Court of this case is therefore imperative.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 01-13776

JAMES N. KIRBY, PTY LTD., d.b.a. Kirby Engineering,
MMI General Insurance Limited,
Plaintiffs-Appellants,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia.

Aug. 8, 2002

Before EDMONDSON, Chief Judge, and CARNES and SILER [*], Circuit Judges.

CARNES, Circuit Judge:

This case, the facts of which began in Australia and ended in Alabama, is about Himalaya clauses, Clauses Paramount, COGSA, the package limitation defense, FBLs, FIATA, and the like. In short, it is a bill of lading case. The issue it presents us is whether a railroad's liability, if any, to a shipper for damage done to goods by the derailment of train is limited by the "Himalaya clause" in either of two bills of lading that were issued for the transport of the goods.

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[*] Eugene E. Siler, Jr., Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

A Himalaya clause is a clause in a bill of lading that extends the carrier's defenses and limitations of liability under the bill to the carrier's agents and subcontractors.[1] Both bills of lading in this case contained Himalaya clauses, although the text of each clause is different. The first bill of lading was issued to James N. Kirby Pty Ltd. (Kirby) by International Cargo Control Pty Ltd. (ICC), an Australian freight forwarder Kirby hired to arrange the shipment of the machinery, and the second bill of lading was issued to ICC by Hamburg Sud, the ocean shipping company ICC hired to perform the actual transport of the goods. Hamburg Sud's ship brought the machinery from its port of departure, Sydney, Australia, to its port of discharge, Savannah, Georgia, where it was placed on a train owned by Norfolk Southern Railway Co., which Hamburg Sud had sub-contracted to transport the machinery inland to its destination, Huntsville, Alabama. The wreck occurred while the train was en route to Huntsville from Savannah, and allegedly caused $1.5 million of damage to the machinery.

The district court decided that Norfolk Southern could limit its liability to Kirby on the basis of the Himalaya clause in the Hamburg Sud bill. We conclude, however, that the Hamburg Sud bill does not limit Norfolk Southern's liability to Kirby because Kirby was not bound by its terms. We further conclude that although the terms of the ICC bill do bind Kirby, that bill does not limit Norfolk Southern's liability because Norfolk Southern is not a clearly designated beneficiary of that bill's Himalaya clause. Therefore, because the district court erroneously concluded that Norfolk Southern should be able to limit its liability to Kirby, we reverse and remand.

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[1] Himalaya clauses take their name from an English case which involved a vessel called the HIMALAYA. *Certain Underwriters at Lloyds' v. Barber Blue Sea Line,* 675 F.2d 266, 269 n. 5 (11th Cir.1982).

I. BACKGROUND

Kirby, a company based in Sydney, Australia, sold ten containers of machinery to the General Motors plant in Huntsville, Alabama. To fulfill its obligation to deliver the machinery to Huntsville, Kirby entered into a contract of carriage with ICC, another Australian company. ICC was a "freight forwarder," a company that arranges for, coordinates, and facilitates cargo transport. To formalize the contract of carriage, ICC issued a bill of lading to Kirby (the ICC bill of lading) for the ten containers of machinery.

The ICC bill of lading embodies ICC's contractual obligation to Kirby to deliver the machinery from Sydney to Huntsville. It names Kirby as the consigner of the cargo, and ICC as the carrier. It designates Sydney as the port of loading, Savannah as the port of discharge, and Huntsville as the ultimate destination of the machinery. It contains a Clause Paramount that invokes the defenses and limitations of liability of the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-1315 to govern ICC's liability to Kirby for any damage done to the goods in the course of the carriage. Finally, it contains a Himalaya clause, a contractual clause that extends to the carrier's agents and contractors the carrier's own defenses and limitations of liability under the bill. *See Fireman's Fund Ins. Co. v. Tropical Shipping & Constr. Co.*, 254 F.3d 987, 993 n. 1 (11th Cir.2001). Specifically, the Himalaya clause in the ICC bill of lading extends the bill's limitations of ICC's liability to "any servant, agent or other person including any independent contractors whose services have been used to perform the contract."

Having been hired by Kirby, ICC then hired Hamburg Sud,[2] a German ocean shipping company, to transport the

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[2] The full name of the German company is Hamburg Sudamerikanische Dampfschifahrts-Geseilschaft Eggert & Amsink, which roughly translates to "Hamburg South American Steam Shipping Company."

machinery from Sydney to Huntsville. Hamburg Sud issued its own bill of lading (the "Hamburg Sud bill") to ICC. On the Hamburg Sud bill, ICC was listed as the shipper, and Hamburg Sud as the carrier. Like the ICC bill, the Hamburg Sud bill named Sydney as the port of loading, Savannah as the port of discharge, and Huntsville as the destination. The Hamburg Sud bill contained its own Clause Paramount, and its own Himalaya clause that extended the bill's limitations on Hamburg Sud's liability to "all agents, servants, employees, representatives, all participating (including inland) carriers and all stevedores, terminal operators, warehousemen, crane operators, watchmen, carpenters, ship cleaners, surveyors and all independent contractors whatsoever."

A Hamburg Sud ship carried the machinery on the ocean leg of the journey, from Sydney to Savannah. Once in Savannah, inland transport to Huntsville was taken on by Norfolk Southern, which had been hired by Hamburg Sud through Columbus Line USA, Hamburg Sud's American subsidiary.[3] Norfolk Southern did not issue its own bill of lading to Columbus Line, but instead acted under the Hamburg Sud bill. The train carrying the containers derailed while en route from Savannah to Huntsville, and allegedly $1.5 million dollars of damage was done to the machinery.[4]

After the train wreck, Kirby sued Norfolk Southern to recover for the damages caused to the machinery by the derailment. Kirby's claims included negligence and breach of contract, among others. Norfolk Southern denied that it

[3] The parties dispute the nature of Columbus Line USA's relationship to Hamburg Sud. Norfolk Southern says Columbus is merely the name under which Hamburg Sud does business in the United States; Kirby claims that Columbus Line U.S.A. is a separate corporate subsidiary of Hamburg Sud. That dispute, however, does not matter to our decision.

[4] Kirby had insured the machinery against such damage with MMI General Insurance, Ltd., and was reimbursed by MMI for the loss. Thus MMI appears with Kirby as a plaintiff in this lawsuit.

was liable, but also filed a motion for partial summary judgment arguing that its liability, if any, was limited by the Himalaya clause in the Hamburg Sud bill of lading.

As mentioned, a Himalaya clause in a bill of lading extends to the carrier's agents and contractors the carrier's defenses and limitations of liability under the bill. Here, as is often the case, both bills invoked the Carriage of Goods by Sea Act (COGSA), meaning that the carrier's defenses and limitations under each bill-and, by extension, the defenses and limitations of any party covered by each bill's Himalaya clause included those provided to carriers by COGSA.[5] One COGSA defense available to a carrier is the "package limitation," which limits the carrier's liability for damage to goods to $500 per package (when the goods are shipped in packages). 46 U.S.C. app. § 1304(5). By invoking COGSA in the Clause Paramount, each bill incorporated COGSA's package limitation as a limit on the carrier's liability. In its summary judgment motion Norfolk Southern claimed that it was entitled, via the Himalaya clause, to claim the package limitation, and thus limit its liability to $5,000—$500 for each of Kirby's ten containers.[6]

The district court granted Norfolk Southern's motion for partial summary judgment, holding that Norfolk Southern's liability to Kirby, if any, was limited to $5,000. The court concluded that the Himalaya clause in the Hamburg Sud bill

[5] COGSA applies of its own force from "tackle to tackle," that is from the time goods are loaded onto the ship to the time they are discharged from it. *See Mannesman Demag Corp. v. M/V CONCERT EXPRESS*, 225 F.3d 587, 589 (5th Cir.2000). The Clause Paramount extends the application of COGSA's liability rules beyond the tackles, just as the Himalaya clause extends the application of those rules to parties other than the carrier.

[6] Whether a container is a COGSA "package" is a topic of frequent dispute. *See, e.g., Tropical Shipping*, 254 F.3d at 997. The issue is not, however, material to disposition of this appeal.

of lading bound Kirby, and that Norfolk Southern was a beneficiary of that clause entitled to invoke the package limitation. The district court then designated its order granting partial summary judgment as appropriate for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and we granted permission to appeal on the issue of whether the bills of lading limit Norfolk Southern's liability.[7]

II. DISCUSSION

We first consider whether the district court was right to decide that the Himalaya clause in the Hamburg Sud bill limited Norfolk Southern's liability to Kirby. Because we conclude that it was not right in that regard, we next consider whether Norfolk Southern's liability is limited by the Himalaya clause in the other bill of lading, the ICC bill. We conclude that it is not so limited. The result of our conclusions that neither bill of lading limits Norfolk Southern's liability to Kirby is that we reverse the district court's grant of partial summary judgment to Norfolk Southern.

A. THE HAMBURG SUD BILL

The Hamburg Sud bill was issued by Hamburg Sud, the ocean shipping company, to ICC, the freight forwarder which had been engaged by Kirby. The Himalaya clause in the Hamburg Sud bill can limit Norfolk Southern's liability to Kirby only if Kirby is bound by the terms of that bill. Yet ICC, not Kirby, hired Hamburg Sud, and ICC, not Kirby, is named on the bill as the shipper of the goods, which means that Kirby did not itself agree to the terms of the bill. If, however, ICC had been acting as Kirby's agent when it entered the shipping contract with Hamburg Sud, then ICC had authority to and did bind Kirby to the terms of the bill,

[7] There were some prior events that tangled up the appeal for a while, but they were eventually straightened out. We will not take up the reader's time with a recounting of them.

including its package limitation and its Himalaya clause. *See, e.g., Great N. Ry. Co. v. O'Connor*, 232 U.S. 508, 513-14, 34 S.Ct. 380, 382, 58 L.Ed. 703 (1914) (holding that a plaintiff who used a freight forwarder to arrange a shipment of goods was bound by limitations of liability in the contracts the freight forwarder made with carriers on the plaintiff's behalf). Therefore, Norfolk Southern can limit its liability to Kirby only if ICC was acting as Kirby's agent when it received Hamburg Sud's bill. Whether it was acting as Kirby's agent at that time is, then, the pivotal question.

ICC's status as a freight forwarder is not itself dispositive of the question, because freight forwarders "may act as agents or as principals, depending on the facts." Stephen G. Wood, *Multimodal Transportation: an American Perspective on Carrier Liability and Bill of Lading Issues*, 46 Am. J. Comp. L. 403, 413 (1998). A freight forwarder acts as an agent when its role is merely to arrange a contract between the cargo owner and the ocean carrier. The ocean carrier issues a bill of lading directly to the cargo owner, who is listed as the shipper on the bill, and the cargo owner pays the ocean carrier, not the freight forwarder, for the carriage. A freight forwarder acts as a principal when it takes on the role of carrier itself, and issues its own bill to the cargo owner listing the cargo owner as the shipper and itself as the carrier. In this latter scenario, the cargo owner pays the forwarder, not the ocean carrier. The forwarder then subcontracts out to an ocean carrier its responsibility under its bill to carry the goods. The ocean carrier issues to the forwarder a second bill of lading that lists the forwarder as the shipper, that is, as a principal.

In this case, ICC was acting as a carrier—a principal—and not as Kirby's agent. This is evident, first, from the structure of the transaction. There were two bills of lading. If ICC had been acting as Kirby's agent, there would have been only one bill of lading, issued by Hamburg Sud to Kirby and listing

Kirby as the shipper. Instead, ICC issued a bill to Kirby, and then ICC in turn was issued a bill by Hamburg Sud. The Hamburg Sud bill listed ICC, not Kirby, as the shipper, thereby evidencing that Hamburg Sud was contracting with ICC as principal and not as agent for Kirby.

That ICC was not acting as Kirby's agent is further evident from the language of the ICC bill. The ICC bill expressly states that ICC was undertaking "to *perform* . . . the entire transport," or "*in [its] own name* to procure the performance of the entire transport." This plain language shows that ICC and Kirby clearly intended that ICC would act as a principal in any subsequent contracts it entered into for the transport of the machinery. In the bill ICC assumes responsibility "for the acts or omissions of its servants or agents." Again, this language indicates that ICC was not acting as Kirby's agent, because if ICC were acting as Kirby's agent it would not be liable for the acts of other agents it hired on behalf of Kirby—they would be Kirby's agents, not ICC's.

The form of the ICC bill also shows ICC was a principal, not Kirby's agent. The bill ICC issued to Kirby was a standard form bill known in the industry as a FBL, which is short for "FIATA Multimodal Transport Bill of Lading."[8] The fact that the bill was an FBL is evident on the face of the bill, whose upper right hand corner bears a logo with the words "FBL" and "FIATA Multimodal Transport Bill of Lading." Commentary from the drafters of the FBL indicates that, when the FBL form is used, the freight forwarder assumes the role of carrier and therefore becomes a principal. *See* Jan Ramberg, *The Law of Freight Forwarding and the 1992 FIATA Multimodal Transport Bill of Lading* 7 (1993)

[8] FIATA is the International Federation of Freight Forwarders Associations, a non-governmental association that represents the freight forwarding industry. "Multimodal" means transport by more than one mode of transportation, e.g., by both ship and rail.

(chair of the FIATA committee that initially drafted the FBL explaining that "[b]y use of FBL the freight forwarder progresses from the legal jungle and clearly establishes himself as a carrier with carrier liability"). While the intent of the drafters of the FBL form does not alone determine the nature of the relationship between Kirby and ICC, that intent, together with the fact that ICC and Kirby chose to use the FBL form, buttresses our conclusion that in receiving ICC's bill Kirby did not engage ICC as its agent, but instead hired ICC as a principal carrier to perform the transport, which ICC in turn sub-contracted to Hamburg Sud.

The Hamburg Sud bill reinforces the conclusion that ICC was acting as principal, and not as Kirby's agent, when it engaged Hamburg Sud. That bill lists ICC, not Kirby, as the party with whom Hamburg Sud was contracting. If ICC had merely been acting as Kirby's agent, arranging a contract between Kirby and an ocean carrier, we would expect the contract with the ocean carrier to reflect as much by indicating that Kirby was a party to the transaction. Yet Kirby's name does not appear on the Hamburg Sud bill.

Finally, our own case law suggests that a freight forwarder should not automatically be taken to be the agent of the party who hires it to facilitate the shipment of goods. In *Naviera Neptuno S.A. v. All Int'l Freight Forwarders, Inc.* 709 F.2d 663, 665 (11th Cir.1983), we reviewed a district court's finding that a freight forwarder was not the agent of the party on whose behalf it had arranged the transport of cargo. Based on its reading of case law, the district court had stated a rule that "absent special particular arrangements between a shipper and its freight forwarder, which arrangements would manifest the requisite exclusivity and control incident to a principal/agent relationship, a freight forwarder is considered as an independent contractor." *Id.* Applying that rule, the district court found that the freight forwarder had not been the agent of the owner of the goods. *Id.* We upheld that finding.

Id. Implicit in our doing so was approval of the rule applied by the district court. In the present case, there were no "special particular arrangements" between Kirby and ICC indicating "exclusivity and control" characteristic of an agency relationship. Instead, Kirby and ICC conducted their transaction on the basis of a form bill, a form bill which, as we have noted, was specifically intended to clearly establish that the freight forwarder, ICC, was *not* the agent of the shipper, Kirby.

Therefore, as the parties intended, and as our case law suggests, when ICC issued its bill to Kirby, ICC did not become Kirby's agent and so did not act as Kirby's agent when it received the second bill of lading from Hamburg Sud.[9] This means that Kirby is not bound by the Himalaya

[9] Norfolk Southern's main argument to the contrary is that, even though the parties did not intend for ICC to act as Kirby's agent, ICC must have been Kirby's agent because ICC was barred from acting as a carrier (and thus as a principal) by federal statute. Norfolk Southern argues that, if ICC was a carrier, it must have been an "ocean transportation intermediary," and as such was required by 46 U.S.C. app. § 1718(a) to have a license from the Federal Maritime Commission. Yet, according to Norfolk Southern, ICC did not have a license.

This argument fails for a number of reasons. First, the licensing requirement Norfolk Southern invokes was not in force at the time that the ICC and Hamburg Sud bills of lading were issued for the transport of Kirby's cargo. The licensing requirement for "ocean transport intermediaries" came into effect in 1999, but the ICC-Kirby transaction occurred in 1997. *Compare* Ocean Shipping Reform Act of 1998, §§ 2, 116, Pub.L. No. 105-258, 112 Stat.1902, 1912 (amending § 1718(a) to require licenses for ocean transport intermediaries); *with* 46 U.S.C. app § 1718(a) (1994) (statute in force at time of Kirby-ICC transaction). Second, even if that statutory requirement had been in force at the time of the Kirby-ICC transaction, it applies only to a "person in the United States," which ICC, an Australian company doing business in Australia, was not. 46 U.S.C. app. § 1718(a). Third, there was no evidence in the summary judgment record that ICC had not registered with the F.C., a point on which Norfolk Southern, as the movant, had the burden of proof. Finally, Norfolk Southern has not convinced us that, even if ICC had been required to have a license to act as a carrier, its failure to have one would work to Kirby's detriment by rendering Kirby bound to the terms of a contract entered into by a party it had never made its agent.

clause in the Hamburg Sud bill, and that the district court erred in deciding that Norfolk Southern could limit its liability to Kirby based on the Hamburg Sud bill of lading.

B. THE ICC BILL

The ICC bill was issued by ICC to Kirby. Because Kirby was a party to the ICC bill it was clearly bound by that bill's terms, including its Himalaya clause. Thus any beneficiary of that Himalaya clause would be entitled to use it to limit its liability to Kirby. Norfolk Southern, however, is not a beneficiary of the Himalaya clause in the ICC bill, because the language of the clause does not specifically identify Norfolk Southern as a member of a well-defined class of its beneficiaries, as is required by the case law.

The roots of that requirement lie in the seminal American case on Himalaya clauses, *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297, 79 S.Ct. 766, 3 L.Ed.2d 820 (1958). In *Herd*, the Supreme Court refused to extend a bill of lading's liability limitations to a stevedore, because the bill only mentioned the carrier as the beneficiary of those limitations. *Id.* at 302, 79 S.Ct. at 769-70. The *Herd* Court, however, left open the possibility that a clause in a bill of lading could limit the liability of parties hired by the carrier, if drafted with sufficient clarity to specifically identify those parties. *Id.* Subsequent cases made that possibility a reality. Today Himalaya clauses are standard fare in bills of lading. However, courts addressing the enforceability of Himalaya clauses are constrained by the *Herd* Court's admonition that "contracts purporting to grant . . . limitation of liability must be strictly construed and limited to their intended beneficiaries." *Herd*, 359 U.S. at 305, 79 S.Ct. at 771.

In this Circuit and its predecessor, Himalaya clauses have been enforced since soon after *Herd*. To temper the enforceability of Himalaya clauses with the principle that those clauses must be narrowly construed and limited to their intended beneficiaries, this Court has developed a "clarity of language" test for determining whether and for whom a Himalaya clause effectively limits liability. *See, e.g. Generali v. D'Amico*, 766 F.2d 485, 488 (11th Cir.1985); *Certain Underwriters at Lloyds v. Barber Blue Sea Line*, 675 F.2d 266, 270 (11th Cir.1982). Under our clarity of language test, we will enforce a Himalaya clause only if it is drafted with "language expressing a clear intent to extend the benefits to a well-defined class of readily identifiable persons," and we will allow the clause to be enforced only by members of that well-defined class. *Hale Container Line, Inc. v. Houston Sea Packing Co.*, 137 F.3d 1455, 1465 (11th Cir.1998).

The Himalaya clause in the ICC bill extends ICC's limitations on liability under the bill to "any servant, agent, or other person including any independent contractors whose services have been used in order to perform the contract." The question is whether this language is clear enough to "extend the benefits to a well-defined class of readily identifiable persons" that includes Norfolk Southern, the inland carrier. "Other person," as a category, is too vague to define a clearly identifiable class of persons, and so it fails to satisfy the clarity of language requirement. *Cf. Rupp v. Int'l Terminal Operating Co.*, 479 F.2d 674, 676 (2d Cir.1973) (finding phrase "all persons rendering services in connection with this contract" overbroad and therefore ineffective). This leaves, then, a Himalaya clause that extends to "any servant, agent, or . . . . any independent contractors."

We have previously stated that "[w]hen a bill refers to a class of persons such as agents and independent contractors, it is clear that the contract includes all those persons engaged by the carrier to perform the functions and duties of the carrier

within the scope of the carriage contract. No further degree of clarity is necessary." *Certain Underwriters*, 675 F.2d at 270. Thus, for example, it is not necessary to enumerate specific categories of agents or independent contractors, such as "stevedore," "terminal operator," and the like. *Id.*

As to the ICC bill, however, Norfolk Southern was not "engaged by the carrier," ICC. Instead, Norfolk Southern was engaged by Hamburg Sud, who in turn had been engaged by ICC, the carrier. Norfolk Southern was a sub-sub-contractor, rather than a party directly "engaged by the carrier," and so it is not "clear that the contract includes" Norfolk Southern in the Himalaya clause. *Id.* If Kirby and ICC had intended for the protections of the ICC bill to extend to sub-sub-contractors, they could have said so. *See, e.g., Uncle Ben's v. Hapag-Lloyd Aktiengesellschaft*, 855 F.2d 215, 218 n. 2 (5th Cir.1988) (interpreting a Himalaya clause "for the benefit of the servants, employees and agents of the carrier as well as of such independent contractors *(including their servants, employees and agents*) whose services the carrier from time to time may engage . . .") (emphasis added); *Gebr. Bellmer KG v. Terminal Serv. Houston, Inc.*, 711 F.2d 622, 625 (5th Cir.1983) (same language).

We recognize that the Ninth Circuit has arguably taken a different view. *Akiyama Corp. of Am. v. M.V. Hanjin Marseilles*, 162 F.3d 571, 574 (9th Cir.1998) (rejecting the argument that privity of contract is required in order to benefit from a Himalaya Clause, and focusing instead on comparing "the nature of the services performed [by the defendant who seeks to invoke the clause] compared to the carrier's responsibility under the carriage contract" (internal quotations omitted)).[10] In this Circuit, however, *Certain*

[10] We also acknowledge that we have previously spoken approvingly of the Ninth Circuit's comparison-of-services rule. In *Hale*, we laid out a two prong test for use in order "[t]o determine whether a party is an independent contractor referenced in a Himalaya clause." 137 F.3d at

Underwriters' limitation of Himalaya clause protections to those parties "engaged by the carrier," together with the *Herd* principle of narrow construction, mean that the law requires privity between the carrier and the party seeking shelter in the Himalaya clause.[11]

1465-1466. Specifically, we said that "a court should (1) compare the nature of the services provided by the party with the carrier's responsibilities under the bill of lading or contract of carriage, and (2) consider whether the independent contractor's duty had been fulfilled at the time when the liability was incurred." *Id.* The first prong of that test is taken from the law of the Ninth Circuit, specifically from *Taisho Marine & Fire Ins. Co. v. Vessel Gladiolus*, 762 F.2d 1364 (9th Cir.1985), which is the same case from which *Akiyama* derived its rule. *Akiyama*, 162 F.3d at 574. In *Hale* we did not, however, affirm this test to the exclusion of a privity requirement. To the contrary, the very ground on which we denied the defendant the protection of the Himalaya clause in *Hale* was exactly that "Houston [the defendant] was neither an agent nor independent contractor of Project Logistics [the carrier] . . . . was not directly employed by Project Logistics, did not receive payment for its services from Project Logistics, had no contractual relationship with Project Logistics, and was not rendered an agent by Project Logistics." *Id.* at 1366. That is, in *Hale* we concluded that the defendant was not entitled to the benefit of the Himalaya clause specifically because he lacked privity (whether by contract, agency, or employment) with the carrier. Thus the result in *Hale* supports our conclusion in this case.

[11] Privity is required where, as here, and as in *Certain Underwriters*, the category term being interpreted in the clause is relational, such as "agent," "servant," or "independent contractor." Where, on the other hand, the term is descriptive, such as "stevedore," "terminal operator," etc., privity of contract is not required. Indeed, the result, though not the language, of *Akiyama* conforms to this rule. In *Akiyama* the two parties were allowed to invoke the Himalaya clause. The first was a terminal operator, who did have contractual privity with the carrier, and was held to be covered by the relational term "independent contractor" in the clause. *Akiyama*, 162 F.3d at 574. The second was a stevedore, who contracted with the terminal operator and thus did not have direct contractual privity with the carrier, but was held to be covered by the descriptive term "stevedore" in the clause. *Id.* We also note that, while the dicta in *Akiyama* says a party seeking to invoke the Himalaya clause

In addition to not having been "engaged by the carrier," Norfolk Southern, unlike any other defendant that we have allowed to claim the benefit of a Himalaya clause, is an inland carrier. In all of our prior Himalaya clause cases, the defendant invoking the Himalaya clause has been a stevedore or other provider of port services. *See, e.g., Fireman's Fund Ins. Co. v. Tropical Shipping and Const. Co.*, 254 F.3d 987, 992 (11th Cir.2001) (stevedore); *Hiram Walker & Sons, Inc. v. Kirk Line*, 877 F.2d 1508, 1510 (11th Cir.1989) (stevedore); *Certain Underwriters*, 675 F.2d at 269 (stevedore and terminal operator). Thus the question of whether and when an inland carrier can claim the benefit of a Himalaya clause is, in this Circuit, still an open one. Other courts that have addressed this issue have reached a variety of results. Almost every court that has extended the protections of a Himalaya clause to an inland carrier has done so in a case where the language of the clause specifically referenced inland carriers. *See, e.g., Canon USA, Inc. v. Norfolk Southern Ry. Co.*, 936 F.Supp. 968, 971-72 (N.D.Ga.1996); *Tokio Marine & Fire Ins. Co. v. Hyundai Merchant Marine Co.*, 717 F.Supp. 1307, 1309 (N.D.Ill.1989); *but see Taisho Marine and Fire Ins. Co. v. Maersk Line*, 796 F.Supp. 336, 339-40 (N.D.Ill.1992) (holding that a rail carrier was covered by a through bill's Himalaya clause that referred only to "subcontractors"). Further, many courts have refused to extend the coverage of a Himalaya clause to an inland carrier when the clause or the bill did not refer to inland transportation. *See, e.g., Caterpillar Overseas, S.A. v. Marine Transport, Inc.*, 900 F.2d 714, 726 (4th Cir.1990) (refusing to extend the protections of a

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need not be in privity with the carrier, the reasoning of another, earlier Ninth Circuit case implicitly contradicts that dicta. *Mori Seiki USA, Inc. v. M/V Alligator Triumph*, 990 F.2d 444, 450-51 (9th Cir.1993) (allowing a stevedore to claim the benefit of a Himalaya clause only after concluding that the party with whom the stevedore contracted, the seaport operator, had acted as the carrier's agent in hiring the stevedore, thereby putting the stevedore in privity with the carrier).

Himalaya clause to a trucker because "[t]ransporting cargo down a group of public highways for a stretch of miles . . . is not a normal maritime operation"); *see also Lucky-Goldstar Int'l, Inc. v. S.S. California Mercury*, 750 F.Supp. 141 (S.D.N.Y.1990). Thus the cases seem to support the principle that a special degree of linguistic specificity is required to extend the benefits of a Himalaya clause to an inland carrier.

This principle makes sense in light of the origins and purpose of Himalaya clauses. Himalaya clauses originally were aimed more at extending COGSA protections to additional parties who handle cargo in and around a port than at extending the reach of those protections inland. That is why most of our cases concerning Himalaya clauses have involved as the defendants stevedores, terminal operators, and other similar parties whose work is done at or close to the point where the cargo is unloaded from the ship. We should be cautious about extending the reach of a Himalaya clause, and with it the reach of COGSA, inland.

We observe that caution in this case even though the bill, unlike bills we have considered in our previous Himalaya clause cases, was a "through bill," that is, a bill which provided for transport to an inland destination rather than merely to the port of discharge. *See Tokio Marine*, 717 F.Supp. at 1309 (defining through bill); *cf. Caterpillar*, 900 F.2d at 726 (declining, where the bill of lading only provided for ocean transport, to afford a trucker a Himalaya clause's protection of "independent contractors" because trucking is not a "maritime service"). The ICC bill identified Huntsville as the point of delivery, which clearly indicates that the bill envisioned land transportation as being necessary to the completion of the contract. This does not mean, however, that the bill also envisioned that the liability regime for the inland leg of the journey would be provided by COGSA via the Himalaya clause. *But see Taisho Marine*, 796 F.Supp. at

340 (relying on the fact that the bill was a through bill in holding that a rail carrier was covered by the Himalaya clause's reference to "subcontractors").

The intent of the drafters of the form bill used between ICC and Kirby reinforces this observation. The FBL form was drafted based on a "network" approach to carrier liability. *See, e.g.*, Ramberg, *supra* at 25, 30-35, 37, 41-42, 65. The network approach envisions that each leg of a journey should be subject to the liability rules governing the mode of transport for that leg. *Id.* at 24. So, for example, losses on the sea leg would be governed by the rules applicable to the carriage of goods by sea, and losses on the rail leg would be subject to the liability regime applicable to railroads. Because the FBL was drafted with this "network" liability system in mind, its Himalaya clause was not designed to extend the liability regime for sea carriers—COGSA—to inland carriers, who instead would be covered by the different liability scheme applicable to rail carriers. The FBL's Himalaya clause is only meant to extend the carrier's protections to parties who are, so to speak, between liability regimes, at the fringes of the sea regime—stevedores, terminal operators, and the like. Therefore, Norfolk Southern, as an inland rail carrier, should not be allowed to invoke the Himalaya Clause in the ICC FBL to its benefit.

This is not to say that a Himalaya clause can never readily identify a well-defined class of persons that includes inland carriers like Norfolk Southern. However, if the Himalaya clause is to extend inland, it must say so with specificity, as, for example, did the Himalaya Clause in the Hamburg Sud bill when it clearly identified as among its beneficiaries "all participating (*including inland*) carriers." (emphasis added). *Cf., e.g. Lucky-Goldstar*, 750 F.Supp. at 145 ("If the parties . . . had intended to include [the railroad] among those protected, little effort would have been required for them to have added to [the Himalaya] clause the term 'inland

carriers,' for example."); *Canon USA*, 936 F.Supp. at 973 ("road and rail transport operators"); *Toshiba Int'l Corp. v. M/V Sea-Land Exp.*, 841 F.Supp. 123, 128 (S.D.N.Y.1994) ("participating land carrier"). Requiring that the clause mention inland transport better satisfies our clarity of language requirement and serve its progenitor, *Herd's* principle that liability limitations in bills of lading must be narrowly construed.

We therefore hold that the language of the Himalaya clause in the ICC bill, which names as its beneficiary "any servant, agent, or other person including any independent contractors whose services have been used in order to perform the contract," does not clearly identify Norfolk Southern, as a sub-sub contractor of the carrier and an inland carrier, as a member of the "well-defined class of readily identifiable persons" entitled to claim the benefits of the clause. *Hale*, 137 F.3d at 1465.

III. CONCLUSION

Norfolk Southern is not entitled to limit its liability to Kirby on the basis of either of the two bills of lading issued for the transport of Kirby's machinery from Sydney to Huntsville. The Himalaya clause in the Hamburg Sud bill does not bind Kirby, and Himalaya clause in the ICC bill of lading does not benefit Norfolk Southern. Therefore, the district court erred in granting partial summary judgment to Norfolk Southern.

REVERSED.

SILER, Circuit Judge, dissenting:

I respectfully dissent from the majority decision. First, I disagree with the majority's conclusion that ICC was acting as a principal, not as Kirby's agent. As the majority states, ICC was a freight forwarder. Although a freight forwarder can be a principal, in this case it was acting as an agent for Kirby. The bill of lading between Kirby and ICC put Kirby on notice that ICC would have to employ other entities to transport the freight. I do not see any significance in having two bills of lading rather than one, which, the majority concludes, is evidence that ICC was not Kirby's agent. There is nothing in the record which indicated that Kirby expected ICC to ship the goods other than by contracting it with another carrier. When Kirby entered into a written contract with ICC to make arrangements for the transportation of the shipment, it declined the opportunity to obtain full liability coverage via its contract. Instead, COGSA through the Clause Paramount limited liability of the carrier.

As the majority states, Kirby was bound by the terms of the bill of lading between it and ICC. That included the Himalaya Clause. Thus, that would include a limitation of liability for Hamburg Sud. I also think that Norfolk Southern was a beneficiary of the Himalaya Clause in the Kirby/ICC bill of lading. Clearly, the bill does not include the name "Norfolk Southern," nor does it say that it includes any inland carrier. Nevertheless, it includes "independent contractors." When the bill of lading between Kirby and ICC was issued, Kirby knew that an inland carrier would have to be used, because of the destination being Huntsville, Alabama. It also knew that it had agreed to a limitation of liability for the carrier. As the majority states, Kirby and ICC could have used clearer language in the bill to include any inland carriers, but that does not mean that the failure to include them specifically precludes the application of a Himalaya Clause. *See Certain Underwriters v. Barber Blue Sea Line*, 675 F.2d 266, 270

(11th Cir.1982) ("The 'clarity of language requirement,' [as stated in *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 305, 79 S.Ct. 766, 771, 3 L.Ed.2d 820 (1959)], does not mean, however, that COGSA benefits extend only to parties specifically enumerated in the bill of lading. It is sufficient that the terms express a clear intent to extend benefits to well-defined class of readily identifiable persons.") I would follow the decision in *Akiyama Corp. v. M.V. Hanjin Marseilles*, 162 F.3d 571, 574 (9th Cir.1998), which focused upon "the nature of the services performed compared to the carrier's responsibility under the carriage contract." I find no inconsistency in that decision with our decision in *Certain Underwriters*.

I also agree with the district court that Kirby was bound by the ICC/Hamburg Sud bill of lading, as it was a "through bill" which covered the entire transportation from Australia to Alabama. The ICC/Hamburg Sud bill of lading expressly included inland carriers. Therefore, the Himalaya Clause extended COGSA protection to Norfolk Southern. *See Taisho Marine & Fire Ins. Co. v. Maersk Line, Inc.*, 796 F.Supp. 336, 339-40 (N.D.Ill.1992); *Tokio Marine & Fire Ins. Co. v. Hyundai Merchant Marine Co.*, 717 F.Supp. 1307, 1309 (N.D.Ill.1989).

When Kirby initially engaged ICC, it accepted the risk and agreed to the limitation of liability on the part of ICC and all of its sub-contractors. Its insurer seeks a windfall by claiming no privity of contract. Kirby knew from the start that the ultimate destination would have to be through an inland carrier, so it should not be able to prevail on the technicality of its lack of privity of contract. Therefore, I would affirm the decision of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed May 17, 2001]

CIVIL ACTION
NO. 1:98-CV-2939-CAP

JAMES N. KIRBY, PTY LTD. d/b/a
Kirby Engineering, and MMI General Insurance, Ltd.,

Plaintiffs,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Defendant.

ORDER

By its previous order, dated October 11, 2000 [Doc. No. 39-1], the court granted the defendant's motion for partial summary judgment [Doc. No. 33-1] and motion to dismiss plaintiff's state law claims [Doc. No. 33-2]. Specifically, the court held that the $500.00 per container COGSA limitation applies to the defendant and limits its liability, if any, to a maximum of $5,000.00. Further, the court held that the plaintiff's state court actions are preempted and barred. Finally, the court held that the plaintiff has, no cause of action against the defendant for punitive damages or recklessness.

Based upon the court's grant of partial summary judgment and dismissal of the plaintiff's state law claims, on October

11, 2000, the Clerk entered judgment in favor of the defendant and dismissed the case [Doc. No. 40-1]. The Clerk's entry of judgment and dismissal were premature. Although the court dismissed four of the five counts in this action, the plaintiffs still have a breach of contract claim.

Accordingly, on January 18, 2001, the court granted the defendant's motion for clarification or in the alternative to set aside the judgment [Doc. No. 47-1] . Pursuant to FED. R. CIV. P. 60(a), the court set aside the entry of judgment and dismissal. The case was to proceed on this remaining claim. Because, however, the case was then pending before the Eleventh Circuit, the parties are unsure of this court's jurisdiction to enter this order. Regardless, now that the Eleventh Circuit has dismissed the appeal jurisdiction over this case unquestionably rests with this court.

The matter is presently before the court on the parties' joint motion to certify partial summary judgment for immediate permissive review. In this motion the parties request that the court, once again, enter an order to set aside the October judgment, now that the court's jurisdiction to do so is no longer in doubt. Further, they also request that the court amend its October order to include a certification of appropriateness for interlocutory appeal of the October order under 28 U.S.C. § 1292(b) and to stay further proceedings in this court until further action by the Eleventh Circuit.

Interlocutory appeals are governed by 28 U.S.C. § 1292(b), which provides, in pertinent part, that:

> When a district judge, in making a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal

> from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

Exceptional circumstances are required to justify a departure from the general policy of postponing appellate review until after the entry of final judgment. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475, 98 S. Ct. 2454 (1978). The statute requires an order "that is directly associated with the disposition of at least a claim, if not the entire case itself." *Harris v. Luckey*, 918 F.2d 888, 891 (11th Cir. 1990). In the Eleventh Circuit there is a "strong presumption against interlocutory appeals." *United States v. One Parcel of Real Property*, 767 F.2d 1495, 1498 (11th Cir. 1985). The availability of review under Section 1292(b) is subject to both the district court's willingness to certify the matter for review and the appellate court's willingness to hear the appeal. *See Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1387 (11th Cir. 1998); *and see* 28 U.S.C. § 1292(b) (stating that, after certification of interlocutory appeal by district court order, "[t]he Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order") ; *see also Mason v. Stallings*, 82 F.3d 1007, 1009-10 (11th Cir. 1996). Importantly, Section 1292(b) directs district courts to certify an "order" and not a "controlling question," even though in deciding whether to do so a court must analyze whether there are any controlling legal questions. *See Yamaha Motor Corp. U.S.A. v. Calhoun*, 516 U.S. 199, 205, 116 S. Ct. 619 (1996) (noting that "the appellate court may address any issue fairly included within the certified order because 'it is the order that is appealable, and not the controlling question identified by the district court.'") (citations omitted).

The key holding that the parties hope to resolve on appeal is this court's holding that the defendant's liability, if any, is limited to $5,000. If the defendant were to be found liable at trial and judgment were entered for $5,000, and if on appeal the Eleventh Circuit were to conclude that the defendant cannot so limit its liability, then a reversal would be necessary. Both parties submit that a full trial on the merits now would be pointless if the defendant's liability is limited to $5,000. If this court's October order is ultimately upheld on appeal, then the case will likely settle for the limitation amount and no trial will be held. Conversely, if the October order is reversed, then the parties submit that they are still likely to settle, albeit at a much higher figure. In the interim, the parties are unable to settle the case because the limitation question has not been finally resolved on appeal.

If permitted to appeal, then the plaintiffs intend to argue that a Himalaya clause may not extend a carrier's limitation rights to a "sub-contractor" such as the defendant. The plaintiffs submit that there are substantial grounds for a difference of opinion because of opposing opinions from the Second and Ninth Circuits. *See e.g. Mikinberg v. Baltic S.S. Co.*, 988 F.2d 327 (2d Cir. 1993) (accepting the plaintiffs' argument) ; *compare e.g. Akiyama Corp. of America v. M.V. Hanjin Marseilles*, 162 F.3d 571 (9th Cir. 1998) (rejecting the plaintiffs' argument). Thus, the parties agree that there is a well-established conflict of authority between two "leading maritime circuits . . . on an issue that the Eleventh Circuit has never addressed . . . ." Joint Motion to Certify at 6.

The parties submit that the entire litigation will likely terminate once the issue of the defendant's liability limitation is finally resolved. According to the parties, if this court does not certify its order for interlocutory appeal, it will be necessary to have a full trial on the liability question, have the court limit any plaintiffs' verdict to $5,000, and then enter a final judgment that the plaintiffs would be entitled to appeal

as of right. In doing so, the parties will be required to conduct a trial with multi-million dollar damages at stake. Such effort and expense would prove pointless for all the parties and the court if this court's October order is affirmed. Thus, the parties submit that resolving the liability question now, before a full trial, will "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The court agrees.

After reviewing the relevant cases and authorities, the court concludes that its October order should be certified. Simply stated, this is the type of case that could benefit from an interlocutory appeal.

CONCLUSION

Having reviewed the record, for the above reasons, the court finds that it is in the best interests of the parties and consistent with the spirit of judicial economy to grant the instant joint motion. The court finds that its order [Doc. No. 39-1] involves a controlling question of law on which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of this litigation.

Accordingly, the court hereby GRANTS the defendant's motion for clarification or in the alternative to set aside the judgment [Doc. No. 47-1]. Pursuant to FED. R. CIV. P. 60 (a), the court hereby SETS ASIDE the entry of judgment and dismissal entered by the Clerk [Doc. No. 40-1]. The case will proceed on the remaining breach of contract claim.

The court hereby GRANTS the parties' joint motion to certify partial summary judgment for immediate permissive review [Doc. No. 50-1]. Accordingly, pursuant to FED. R. CIV. P. 60 (a), the court hereby AMENDS its order [Doc. No. 39-1] and CERTIFIES its order for interlocutory appeal.

The court hereby STAYS all proceedings in this case until the Eleventh Circuit rules on the immediate appeal.

SO ORDERED, this 17 day of May, 2001.

/s/ Charles A. Pannell,
CHARLES A. PANNELL, JR.
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed Oct. 11, 2000]

CIVIL ACTION
NO. 1:98RCV-2939-CAP

JAMES N. KIRBY, PTY LTD. d/b/a
Kirby Engineering, and MMI
General Insurance, Ltd.,
Plaintiffs,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Defendant.

ORDER

The plaintiffs filed the instant action, seeking to recover for damages to certain cargo which occurred when the defendant's train de-railed. The matter is currently before the court on the defendant's motion for partial summary judgment and motion to dismiss state law claims.

I. BACKGROUND AND PROCEDURAL HISTORY

James N. Kirby, PTY Ltd. d/b/a Kirby Engineering ("Kirby"), an Australian firm, manufactures machinery in Australia. Kirby sold ten containers of machinery, valued at over $2,000,000, to the General Motors plant in Huntsville, Alabama. To get the containers from Australia to Alabama, Kirby entered into a Bill of Lading contract with International

Cargo Control ("ICC"), an Australian cargo broker. ICC does not transport cargo, but rather arranges for cargo transportation by carriers.

The Kirby/ICC Bill of Lading contained a limitation of liability provision which limited ICC's responsibility for loss or damage to Kirby's cargo to $500.00 per package. *See* Carriage of Goods by Sea Act ("COGSA"); 46 U.S.C. § 1300, et seq. In contracting, Kirby was given the opportunity to declare a value in excess of $500.00 and to obtain higher coverage for its cargo, paying an additional ad valorem rate charge for the shipment. Instead, Kirby separately insured its cargo with its co-plaintiff, MMI General. Insurance, Ltd. ("MMI").

After entering into the bill with Kirby, ICC entered a "through" bill of lading contract with a steamship company, Hamburg Sudamerikanische Dampfschifahrts-Geseilschaft Eggert and Amsinck ("Hamburg Sud"), to transport the containers from Australia to Huntsville, Alabama. The ICC/Hamburg Sud Bill of Lading also provided for a $500.00 per package limitation of liability, and gave ICC the opportunity to declare a cargo value in excess of $500.00 per container. ICC did not declare a higher value for the plaintiff's cargo.

Hamburg Sud used one of its subsidiaries, Columbus Line Australia Pty. Ltd. ("Columbus Lines Australia"), for the carriage of the goods by sea. To handle the overland part of the transport, Columbus Line Australia used another company, Columbus Line USA, Inc. ("Columbus Line USA"), which contracted with Norfolk Southern Railway Company (the "defendant"), a Virginia corporation. On October 9, 1997, the defendant's train, carrying Kirby's cargo, derailed in Alabama. The defendant had issued freight bills for the shipment, but did not issue its own bill of lading. Rather, the defendant acted for Columbus Lines USA, which acted for

Hamburg Sud, under the Hamburg Sud/ICC Bill of Lading, which was entered by ICC pursuant to the Kirby/ICC Bill of Lading. Thus, there is no direct contractual relationship between Kirby and the defendant.

The defendant, contends that its liability for damages to Kirby's cargo, if any, is contractually limited to $500.00 per package or $5,000.00. The plaintiffs, through several separate claims, seek to recover the full value of the goods. Alternatively, the plaintiffs assert that the defendant's recklessness negates the contractual limitation of liability. The defendant claims that no one is at fault for the derailment. The plaintiff's expert found that the misapplication of the airbrakes, coupled with the dangerous nature of the particular stretch of track, demonstrates that the defendant's engineer acted in "conscious disregard of a substantial risk of harm and with knowledge that damage would probably result, i.e. recklessness."

The Language of the Contracts

A. Kirby/ICC Bill of Lading

The Kirby/ICC Bill of Lading provided that ICC would ship Kirby's goods, from Sydney, Australia, as the Port of Loading, to Huntsville, Alabama, as the Place of Delivery, and included a $500.00 per package limitation of liability. The Kirby/ICC Bill of Lading also included a box designated "Declared Value for Ad Valorem Rate According to the Declaration of the Consignor," which could have been utilized by Kirby to declare a higher value for its cargo, if it had so desired. The instructions relative to electing higher values, and the consequences of failing to do so are provided in Paragraph 8.6(b) of the contract:

> Unless the nature and value of the goods shall have been declared by the Merchant and inserted in this FBL, and the ad valorem freight rate paid, the liability of the

> Freight Forwarder under COGSA, where applicable, shall not exceed U.S. $500 per package or, in case of goods not shipped in packages, per customer freight unit.

Kirby did not declare a value in excess of the $500.00 limitation of liability, nor pay the additional ad valorem rate charge.

B. ICC/Hamburg Sud Bill of Lading

The defendant contends that the ICC/Hamburg Sud Bill of Lading was a "through shipment," which means that the place of the delivery of the shipment is not the same as the port of discharge. The Bill assumed an inland portion and provided that:

> the Carrier shall be entitled to sub-contract on any terms the whole or any part of the carriage, loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by it in relation to the Goods or Containers . . . It is understood and agreed that if it should be adjudged that any person or entity other than or in addition to the Carrier is under any responsibility with respect to the Goods . . . , all exemptions of and exonerations from liability provided by law or by the Terms and Conditions hereof shall be available to all agents, servants, employees, representatives, all participating (including inland) carriers and all stevedores, terminal operators, warehouseman, crane operators, watchmen, carpenters, ship cleaners, surveyors and all independent contractors whatsoever. In contracting for the foregoing exemptions, limitations of and exonerations from liability, the Carrier is acting as agent and trustee for and on behalf of all persons described above, all of whom shall to this extent be deemed a party the contract evidence by this Bill of Lading . . . The Carrier [may] undertake [ ] . . . such

> services as necessary and shall have the right at its sole discretion to select any mode of land, sea or air transport . . .

(emphasis added) ICC/Hamburg Sud Bill of Lading at Sub-Section 5 (Exhibit B to defendant's memorandum in support of its motion for partial summary judgment). Further, similar to the Kirby/ICC Bill of Lading, pursuant to the terms of the COGSA, the ICC/Hamburg Sud Bill of Lading limited the liability of Hamburg Sud, and any other "participating carrier [ ]," by sea, land, or air, to $500.00 per container. Similar to Kirby in the Kirby/ICC Bill of Lading, ICC had the opportunity to declare a higher value on the ICC/Hamburg Sud Bill of Lading, as well as pay a higher ad valorem charge to transport the shipment, and did not do so.

C. Columbus Lines USA's Contract with Norfolk Southern

Columbus Lines USA contracted with the defendant to transport the cargo by rail. The defendant contends that the ICC/Hamburg Sud Bill of Lading, recited above, extended the COGSA liability limitation to it via Paragraph 5(a) of that Bill, entitled Subcontracting Beneficiaries, which specifically provides that:

> the Carrier shall be entitled to sub-contract on any terms the whole or any part of the carriage, loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by it in relation to the Goods or Containers . . . .

The defendants argue that when Columbus Lines contracted with the defendant for the inland transportation, the $500.00 per package limitation of liability was contractually extended to the defendant. The provision of the contract extending

that limitation, generally known as a "Himalaya" clause, provides that:

> It is understood and agreed that if it should be adjudged that any person or entity other than or in addition to the Carrier is under any responsibility with respect to the Goods . . ., all exemptions of and exonerations from liability provided by law or by the Terms and Conditions hereof shall be available to all agents, servants, employees, representatives, all participating (including inland) carriers and all stevedores, terminal operators, warehouseman, crane operators, watchmen, carpenters, ship cleaners, surveyors and all independent contractors whatsoever.

(emphasis added) The plaintiffs counter that the defendant's are bound by the Intermodal Rules Circular (the "Circular"), because the defendant's initial correspondence relied on the Circular.

II. LEGAL DISCUSSION

A. *Legal Standard For Summary Judgment*

Rule 56(c) of the Federal Rules of Civil Procedure authorizes summary judgment when all "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." The party seeking summary judgment bears the burden of demonstrating that no dispute as to any material fact exists. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156, 90 S. Ct. 1598, 1608 (1970); *see also Bingham, Ltd. v. United States*, 724 F.2d 921, 924 (11th Cir. 1984). The moving party's burden is discharged merely by "'showing'—that is, pointing out to the District Court—that there is an absence of evidence to support [an essential element of] the nonmoving party's case." *Celotex*

Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554 (1986). In determining whether the moving party has met this burden, the district court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. *See Bradbury v. Wainwright*, 718 F.2d 1538, 1543 (11th Cir. 1983). Once the moving party has adequately supported its motion, the non-movant then has the burden of showing that summary judgment is improper by coming forward with specific facts showing a genuine dispute. *See Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986).

In deciding a motion for summary judgment, it is not the court's function to decide genuine issues of material fact but to decide only whether there is such an issue to be tried. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S. Ct. 2505, 2511 (1986). The applicable substantive law will identify those facts that are material. Facts that in good faith are disputed, but which do not resolve or affect the outcome of the case, will not preclude the entry of summary judgment as those facts are not material. *See Anderson*, 477 U.S. at 247, 106 S. Ct. at 2510.

Genuine disputes are those by which the evidence is such that a reasonable jury could return a verdict for the non-movant. *See id.* In order for factual issues to be "genuine" they must have a real basis in the record. *See Matsushita*, 475 U.S. at 586, 106 S. Ct. at 1356. When the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *Id.* (citations omitted).

B. *Applicability of Bill of Lading Terms to the Defendant*

Simply, the defendant argues that it is entitled to the $500.00 per package limitation of liability protection afforded to the carrier by the COGSA and the bill of lading. *See generally* 46 U.S.C. § 1300, et seq. Conversely, the plaintiffs

argue that the defendant, a land-based rail carrier, is not protected by the limitation of liability provisions.

The COGSA governs the rights, obligations, and liabilities of the parties to a bill of lading for the carriage of goods by sea. The COGSA provides a strict limitation on the carrier's liability: "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package." 46 U.S.C. § 1304(5). The COGSA, by its terms, only applies to the ocean portion of the shipment. *See* 46 U.S.C. § 1301(e).

A bill of lading, however, can contractually expand the COGSA coverage to third-parties if it expresses a clear intent to provide benefits "to a well-defined class of readily identifiable persons" such as agents and subcontractors. *See Canon USA, Inc. v. Norfolk Southern Railway, Co.*, 936 F. Supp. 968, 971 (N.D. Ga. 1996); *and see Certain Underwriters at Lloyds' v. Barber Blue Sea Line*, 675 F.2d 266, 270 (11th Cir. 1982). Such a clause is called a "Himalaya Clause" and is to be strictly construed. *See id.*; *Robert C. Herd & Co. v Krawill Mach. Corp.*, 359 U.S. 297, 305, 79 S. Ct. 766, 771 (1959).

The plaintiffs argue that the COGSA does not apply to the defendant because it lacked a direct contractual relationship with the shipper and so it cannot enjoy the benefit of the Himalaya clause contained in the ICC/Hamburg Sud Bill of Lading. Essentially, the plaintiffs contend that while the ICC/Hamburg Sud Bill of Lading may extend COGSA coverage to a subcontractor, it cannot extend that coverage to a sub-subcontractor, because the clause at issue does not express a clear intention to provide those benefits to a "well defined class of readily identifiable persons" that includes the defendant. *See Lucky-Goldstar Int'l v. S.S. California Mercury*, 750 F. Supp. 141 (S.D.N.Y. 1990). Thus, the plaintiff contends that the ICC/Hamburg Sud Bill of Lading

lacks the required clarity of language. *See Lucky-Goldstar Int'l*, 750 F. Supp. at 145. Further, the plaintiffs argue that the specific language of the Himalaya clause in the ICC/Hamburg Sud Bill of Lading at Sections 10.1, 10.2, and 10.4, fails to provide that the carrier can sub-contract on "any terms" and does not include the term "inland carriage." The failure to include these terms in *Lucky-Goldstar*, was fatal to the Himalaya Clause's protection for the defendant. *See id.*

The defendant counters that the instant Himalaya clause extended the COGSA limitation of liability to it, even though it is an inland carrier. *See Certain Underwriters at Lloyds'*, 675 F.2d at 266. The defendant points out that in the Eleventh Circuit:

> [t]he 'clarity of language' requirement does not mean . . . that COGSA benefits extend only to parties specifically enumerated in the bill of lading. [Rather], [i]t is sufficient that the terms express a clear intent to extend benefits to a well-defined class of readily identifiable persons. When a bill refers to a class of persons such as 'agents' and 'independent contractors' it is clear that the contract includes all those persons engaged by the carrier to perform the functions and duties of the carrier within the scope of the carriage contract. No further degree of clarity is necessary.

Id. at 270. While the defendant concedes that the COGSA is not compulsorily applicable to it, it argues that the Himalaya clause contained in paragraph 5 of the ICC/Hamburg Sud Bill of Lading makes it applicable. Thus, the parties' chief disagreements on this issue are over the scope of the ICC/Hamburg Sud Bill of Lading and the clarity of the class definition contained therein.

To this end, the defendant argues that the Bill of Lading was a "through bill" which covered the entire voyage from Australia to Huntsville, Alabama. "A through bill of lading

governs the entire transportation of goods and applies to connecting carrers even though they are not parties to the contract." *Tokio Marine & Fire Ins. Co. v. Hyundai Merchant Marine Co.*, 717 F. Supp. 1307, 1309 (N.D.I11. 1989). Where a bill of lading designates on its face the final destination, then it is a through bill. *See Taisho Marine and Fire Ins. v. Maersk Line Inc.*, 796 F.Supp. 336, 339 (N.D.I11. 1992). The ICC/Hamburg Sud Bill of Lading lists Savannah, Georgia, as its "port of discharge from vessel" and Huntsville, Alabama, as its "place of delivery." The defendant argues that because no second bill of lading for the inland portion of the cargo's transport was issued and the ICC/Hamburg Sud Bill of Lading contemplates a through shipment, the bill was a through bill.

In reviewing bills of lading purporting to extend COGSA protection beyond the carrier or ship, the court strictly construes the contract and limits the intended beneficiaries "for they're not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language expresses such to be the understanding of the contracting parties.'" *Robert C. Herd & Co.*, 359 U.S. at 305, 79 S. Ct. 766. Although mindful that "disputed questions regarding the parties' intentions should not be adjudicated on a motion for summary judgment," *Savarin Corp. v. National Bank of Pakistan*, 290 F. Supp. 285 (S.D.N.Y. 1968), the court recognizes that the shipping industry is exacting in its documentation requirement and will hold parties to the "technical precision of [the] language" of the agreement to which they are bound. *Toyomenka, Inc. v. S.S. Tosaharu Maru*, 523 F.2d 518, 520 (2d Cir. 1975). The ICC/Hamburg Sud Bill of Lading expressly includes the phrase "(including inland) Carriers." This court holds that where a Himalaya clause expressly extends COGSA protection to "inland carriers," railroads are included and protected by COGSA. *See Tokio Marine & Fire Ins. Co. v. Hyundai Merchant Marine Co.*, 717 F.Supp. 1307,

1309 (N.D.I11. 1989); *Royal Insurance v. Westwood Transpacific Service*, No. C-88-832M (W.D.Wash. April 25, 1990). The language in the ICC/Hamburg Sud Bill of Lading is clear and unambiguous, and the defendant is entitled to COGSA protection.

The plaintiffs' alternative argument that it is not bound to the terms of the ICC/Hamburg Sud Bill of Lading because its contract is the Kirby/ICC Bill of Lading is wholly without merit. One who contracts with others to make arrangements for the transportation of his goods is bound by the terms of the contract entered into on his behalf. *See Great Northern Railway Co. v. O'Connor*, 232 U.S. 508, 34 S. Ct. 380 (1914). The plaintiff erroneously argues that the Himalaya clause at issue is the one contained in the Kirby/ICC Bill of Lading. Rather, the applicable bill to the instant dispute is the one which the defendant contracted and performed under, the ICC/Hamburg Sud Bill of Lading. As explained above, that bill's Himalaya clause unambiguously contemplates inland carriers and thus the defendant.

C. *State Law Claims*

The plaintiffs have asserted several state law causes of action, including negligence, bailment, recklessness, and punitive damages. The COGSA, however, preempts causes of action that arise under state law, except where there has been criminal misconduct by a carrier or its agent. *See Jones v. Compagnie Generale Maritime*, 882 F.Supp. 1079, 1085 (S.D.Ga. 1995) ("the intent to commit a criminal act is what removes behavior from COGSA's reach"). Having carefully reviewed the pleadings, depositions and affidavits, the court finds that the plaintiff has made no showing of criminal intent. Accordingly, the defendant is entitled to summary judgment as to the plaintiffs' state law claims.

D. *Recklessness Claim*

The Kirby/ICC Bill of Lading provides that the Freight Forwarder is not entitled to the limitation of liability if the cargo is damaged by an intentional act or recklessness. Putting aside the question of whether any party besides ICC can be considered a Freight Forwarder, the court finds that the plaintiffs erroneously rely on the Kirby/ICC Bill of Lading. The defendant performed its contract pursuant to the ICC/Hamburg Sud Bill of Lading which does not contain the "recklessness" language at issue. Whether the defendant was reckless is immaterial to the enforceability of COGSA under the ICC/Hamburg Sud Bill of Lading. Accordingly, the plaintiffs have no cause of action against the defendant for punitive damages or recklessness.

III. CONCLUSION

For the foregoing reasons, the court hereby GRANTS the defendant's motion for partial summary judgment [Doc. No. 33-1] and motion to dismiss plaintiff's state law claims [Doc. No. 33-2]. Specifically, the court holds that the $500.00 per container COGSA limitation applies to the defendant and limits its liability, if any, to a maximum of $5,000.00. Further, the court holds that the plaintiff's state court actions are preempted and barred. Finally, the court holds that the plaintiff has no cause of action against the defendant for punitive damages or recklessness. In reaching its decision, the court does not address what claims, if any, the plaintiffs may have against ICC, Hamburg Sud, Columbus Lines Australia of Columbus Lines USA.

SO ORDERED, this 11 day of October, 2000.

/s/ Charles A. Pannell, Jr.
CHARLES A. PANNELL, JR.
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIIRCUIT

[Filed Oct. 7, 2002]

No. 01-13776-CC

JAMES N. KIRBY, PTY, LTD.,
d.b.a. Kirby Engineering,
MMI GENERAL INSURANCE LIMITED,
Plaintiffs-Appellants,

versus

NORFOLK SOUTHERN RAILWAY COMPANY,
Defendant-Appellee.

On Appeal from the United States District Court of the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, ___ F.2d ___).

Before: EDMONDSON, Chief Judge, CARNES and SILER*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules

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* Honorable Eugene E. Siler, Jr., Circuit Judge, U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Judge Carnes
UNITED STATES CIRCUIT JUDGE

APPENDIX E

46 U.S.C. app. § 1300. Bills of lading subject to chapter

Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter.

(Apr. 16, 1936, c. 229, 49 Stat. 1207.)

46 U.S.C. app. § 1301. Definitions

When used in this chapter—

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) The term "goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) The term "ship" means any vessel used for the carriage of goods by sea.

(e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

(Apr. 16, 1936, c. 229, § 1, 49 Stat. 1208.)

46 U.S.C. app. § 1302. Duties and rights of carrier

Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title.

(Apr. 16, 1936, c. 229, § 2, 49 Stat. 1208.)

46 U.S.C. app. § 1303. Responsibilities and liabilities of carrier and ship

(1) Seaworthiness

The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

(2) Cargo

The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

(3) Contents of bill

After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such

marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: *Provided*, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

(4) Bill as prima facie evidence

Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b), and (c), of this section: *Provided*, That nothing in this chapter shall be construed as repealing or limiting the application of any part of sections 81 to 124 of Title 49.

(5) Guaranty of statements

The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

(6) Notice of loss or damage; limitation of actions

Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof, under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided*, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

(7) "Shipped" bill of lading

After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading: *Provided*, That if the shipper shall have previously taken up

any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

(8) Limitation of liability for negligence

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

(Apr. 16, 1936, c. 229, § 3, 49 Stat. 1208.)

46 U.S.C. app. § 1304. Rights and immunities of carrier and ship

(1) Unseaworthiness

Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness,

the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

(2) Uncontrollable causes of loss

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

(3) Freedom from negligence

The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

(4) Deviations

Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however*, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

(5) Amount of liability; valuation of cargo

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper

before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

(6) Inflammable, explosive, or dangerous cargo

Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

(Apr. 16, 1936, c. 229, § 4, 49 Stat. 1210.)

46 U.S.C. app. § 1305. Surrender of rights; increase of liabilities; charter parties; general average

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this chapter, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this chapter shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this chapter. Nothing in this chapter shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

(Apr. 16, 1936, c. 229, § 5, 49 Stat. 1211.)

46 U.S.C. app. § 1306. Special agreement as to particular goods

Notwithstanding the provisions of sections 1303 to 1305 of this title, a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea: *Provided*, That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect: *Provided*, That this section shall not apply to ordinary

commercial shipments made in the ordinary course of trade but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

(Apr. 16, 1936, c. 229, § 6, 49 Stat. 1211.)

46 U.S.C. app. § 1307. Agreement as to liability prior to loading or after discharge

Nothing contained in this chapter shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

(Apr. 16, 1936, c. 229, § 7, 49 Stat. 1212.)

46 U.S.C. app. § 1308. Rights and liabilities under other provisions

The provisions of this chapter shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916, or under the provisions of sections 175, 181 to 183, and 183b to 188 of this title or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels.

(Apr. 16, 1936, c. 229, § 8, 49 Stat. 1212.)

46 U.S.C. app. § 1309. Discrimination between competing shippers

Nothing contained in this chapter shall be construed as permitting a common carrier by water to discriminate between competing shippers similarly placed in time and

circumstances, either (a) with respect to their right to demand and receive bills of lading subject to the provisions of this chapter; or (b) when issuing such bills of lading, either in the surrender of any of the carrier's rights and immunities or in the increase of any of the carrier's responsibilities and liabilities pursuant to section 1305 of this title; or (c) in any other way prohibited by the Shipping Act, 1916, as amended.

(Apr. 16, 1936, c. 229, § 9, 49 Stat. 1212.)

46 U.S.C. app. § 1310. Weight of bulk cargo

Where under the customs of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in this chapter, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

(Apr. 16, 1936, c. 229, § 11, 49 Stat. 1212.)

46 U.S.C. app. § 1311. Liabilities before loading and after discharge; effect on other laws

Nothing in this chapter shall be construed as superseding any part of sections 190 to 196 of this title, or of any other law which would be applicable in the absence of this chapter, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

(Apr. 16, 1936, c. 229, § 12, 49 Stat. 1212.)

46 U.S.C. app. § 1312. Scope of chapter; "United States"; "foreign trade"

This chapter shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this chapter the term "United States" includes its districts, territories, and possessions. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: *Provided, however*, That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter, shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter: *Provided further*, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this chapter.

(Apr. 16, 1936, c. 229, § 13, 49 Stat. 1212; Proc. No. 2695, July 4, 1946, 11 F.R. 7517, 60 Stat. 1352.)

46 U.S.C. app. § 1313. Suspension of provisions by President

Upon the certification of the Secretary of Transportation that the foreign commerce of the United States in its competition with that of foreign nations is prejudiced by the provisions, or any of them, of sections 1301 to 1308 of this title, or by the laws of any foreign country or countries relating to the carriage of goods by sea, the President of the United States may, from time to time, by proclamation, suspend any or all provisions of said sections for such periods of time or

indefinitely as may be designated in the proclamation. The President may at any time rescind such suspension of said sections, and any provisions thereof which may have been suspended shall thereby be reinstated and again apply to contracts thereafter made for the carriage of goods by sea. Any proclamation of suspension or rescission of any such suspension shall take effect on a date named therein, which date shall be not less than ten days from the issue of the proclamation.

Any contract for the carriage of goods by sea, subject to the provisions of this chapter, effective during any period when sections 1301 to 1308 of this title, or any part thereof, are suspended, shall be subject to all provisions of law now or hereafter applicable to that part of said sections which may have thus been suspended.

(Apr. 16, 1936, c. 229, § 14, 49 Stat. 1213.; Aug. 6, 1981, Pub.L. 97-31, § 12(146), 95 Stat. 166.)

46 U.S.C. app. § 1314. Effective date; retroactive effect

This chapter shall take effect ninety days after April 16, 1936; but nothing in this chapter shall apply during a period not to exceed one year following April 16, 1936, to any contract for the carriage of goods by sea, made before April 16, 1936, nor to any bill of lading or similar document of title issued, whether before or after such date in pursuance of any such contract as aforesaid.

(Apr. 16, 1936, c. 229, § 15, 49 Stat. 1213.)

46 U.S.C. app. § 1315. Short title

This chapter may be cited as the "Carriage of Goods by Sea Act."

(Apr. 16, 1936, c. 229, § 16, 49 Stat. 1213.)

APPENDIX F

Standard Conditions (1992) governing the FIATA MULTIMODAL TRANSPORT BILL OF LADING

Definitions

- Freight Forwarder–means the Multimodal Transport Operator who issues this FBL and is named on the face of it and assumes liability for the performance of the multimodal transport contract as a carrier.
- Merchant–means and includes the Shipper, the Consignor, the Consignee, the Holder of this FBL, the Receiver and the Owner of the Goods.
- Consignor–means the person who concludes the multimodal transport contract with the Freight Forwarder.
- Consignee–means the person entitled to receive the goods from the Freight Forwarder.
- Taken in charge–means that the goods have been handed over to and accepted for carriage by the Freight Forwarder at the place of receipt evidenced in this FBL.
- Goods–means any property including live animals as well as containers, pallets or similar articles of transport or packaging not supplied by the Freight Forwarder, irrespective of whether such property is to be or is carried on or under deck.

1. Applicability
Notwithstanding the heading—FIATA Multimodal Transport Bill of Lading (FBL)—these conditions shall also apply if only one mode of transport is used.

2. Issuance of this FBL

2.1 By issuance of this FBL the Freight Forwarder

a) undertakes to perform and/or in his own name to procure the performance of the entire transport, from the place at which the goods are taken in charge (place of receipt evidenced in this FBL) to the place of delivery designated in this FBL:

b) assumes liability as set out in these conditions.

2.2. Subject to the conditions of this FBL the Freight Forwarder shall be responsible for the acts and omissions of his servants or agents acting within the scope of their employment, or any other person of whose services he makes use for the performance of the contract evidenced by this FBL, as if such acts and omissions were his own.

3. Negotiability and title to the goods

3.1. This FBL is issued in a negotiable form unless it is marked-non negotiable-. It shall constitute title to the goods and the holder, by endorsement of this FBL, shall be entitled to receive or to transfer the goods herein mentioned.

3.2. The information in this FBL shall be prima facie evidence of the taking in charge by the Freight Forwarder of the goods as described by such information unless a contrary indication, such as–shipper's weight, load and count-, -shipper-packed container-or similar expressions, has been made in the printed text or superimposed on this FBL. However, proof to the contrary shall not be admissible when the FBL has been transferred to the consignee for valuable consideration who in good faith has relied and acted thereon.

* * * *

6. Freight Forwarder's Liability

6.1. The responsibility of the Freight Forwarder for the goods under these conditions covers the period from the time the Freight Forwarder has taken the goods in his charge to the time of their delivery.

6.2. The Freight Forwarder shall be liable for loss of or damage to the goods as well as for delay in delivery if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in Clause 2.1a. unless the Freight Forwarder proves that no fault or neglect of his own, his servants or agents or any other person referred to in Clause 2.2. has caused or contributed to such loss, damage or delay. However, the Freight Forwarder shall only be liable for loss following from delay in delivery if the Consignor has made a declaration of interest in timely delivery which has been accepted by the Freight Forwarder and stated in this FBL.

* * * *

7. Paramount Clauses

7.1. These conditions shall only take effect to the extent that they are not contrary to the mandatory provisions of International Conventions or national law applicable to the contract evidenced by this FBL.

7.2. The Hague Rules contained in the International Convention for the unification of certain rules relating to Bills of Lading, dated Brussels 25th August 1924, or in those countries where there are already in force the Hague-Visby Rules contained in the Protocol of Brussels, dated 23rd February 1968, as enacted in the Country of Shipment, shall apply to all carriage of goods by sea and also to the carriage of goods by

inland waterways, and such provisions shall apply to all goods whether carried on deck or under deck.

7.3. The Carriage of Goods by Sea Act of the United States of America (COGSA) shall apply to the carriage of goods by sea, whether on deck or under deck, if compulsorily applicable to this FBL or would be applicable but for the goods being carried on deck in accordance with a statement on this FBL.

8. Limitation of Freight Forwarder's Liability.

8.1. Assessment of compensation for loss of or damage to the goods shall be made by reference to the value of such goods at the place and time they are delivered to the consignee or at the place and time when, in accordance with this FBL, they should have been so delivered.

8.2. The value of the goods shall be determined according to the current commodity exchange price or, if there is no such price, according to the current market price or, if there are no such prices, by reference to the normal value of goods of the same name and quality.

8.3. Subject to the provisions of subclauses 8.4 to 8.9. Inclusive, the Freight Forwarder shall in no event be or become liable for any loss of or damage to the goods in an amount exceeding the equivalent of 666.67 SDR per package or unit or 2 SDR per kilogramme of gross weight of the goods lost or damaged, whichever is the higher, unless the nature and value of the goods shall have been declared by the Consignor and accepted by the Freight Forwarder before the goods have been taken in his charge, or the ad valorem freight rate paid, and such value is stated in the FBL by him, then such declared value shall be the limit.

8.4. Where a container, pallet or similar article of transport is loaded with more than one package or unit, the packages or other shipping units enumerated in the FBL as packed in such article of transport are deemed packages or shipping units. Except as aforesaid, such article of transport shall be considered the package or unit.

8.5. Notwithstanding the above mentioned provisions, if the multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the Freight Forwarder shall be limited to an amount not exceeding 8.33 SDR per kilogramme of gross weight of the goods lost or damaged.

8.6. a) When the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law would have provided another limit of liability if a separate contract of carriage had been made for that particular stage of transport, then the limit of the Freight Forwarder's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law.

b) Unless the nature and value of the goods shall have been declared by the Merchant and inserted in this FBL, and the ad valorem freight rate paid, the liability of the Freight Forwarder under COGSA, where applicable, shall not exceed US $ 500 per package or, in the case of goods not shipped in packages, per customary freight unit.

8.7. If the Freight Forwarder is liable in respect of loss following from delay in delivery, or consequential loss or damage other than loss of or damage to the

goods, the liability of the Freight Forwarder shall be limited to an amount not exceeding the equivalent of twice the freight under the multimodal contract for the multimodal transport under this FBL.

8.8. The aggregate liability of Freight Forwarder shall not exceed the limits of liability for total loss of the goods.

8.9. The Freight Forwarder is not entitled to the benefit of the limitation of liability if it is proved that the loss, damage or delay in delivery resulted from a personal act or omission of the Freight Forwarder done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

9. Applicability to Actions in Tort

These conditions apply to all claims against the Freight Forwarder relating to the performance of the contract evidenced by this FBL, whether the claim be founded in contract or in tort.

10. Liability of Servants and other Persons

10.1. These conditions apply whenever claims relating to the performance of the contract evidenced by this FBL are made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract, whether such claims are founded in contract or in tort, and the aggregate liability of the Freight Forwarder and of such servants, agents or other persons shall not exceed the limits in clause 8.

10.2. In entering into this contract as evidenced by this FBL, the Freight Forwarder, to the extent of these provisions, does not only act on his own behalf, but also as agent or trustee for such persons, and such

persons shall to this extent be or be deemed to be parties to this contract.

10.3. However, if it is proved that the loss of or such loss or damage to the goods resulted from a personal act or omission of such a person referred to in Clause 10.1., done with intent to cause damage, or recklessly and with knowledge that damage would probably result, such person shall not be entitled to benefit of limitation of liability provided for in Clause 8.

10.4. The aggregate of the amounts recoverable from the Freight Forwarder and the persons referred to in Clauses 2.2. and 10.1. shall not exceed the limits provided for in these conditions.

11. Method and Route of Transportation

Without notice to the Merchant, the Freight Forwarder has the liberty to carry the goods on or under deck and to choose or substitute the means, route and procedure to be followed in the handling, stowage, storage, and transportation of the goods.

* * * *

APPENDIX G

1. DEFINITIONS.

* * * *

e.) "Merchant" means the shipper, consignee, receiver, holder of this Bill of Lading, owner of the cargo or person entitled to the possession of the cargo and the servants and agents of any of these, all of whom shall be jointly and severally liable to the Carrier for the payment of all Charges, and for the performance of the obligations of any of them under this Bill of Lading.

* * * *

4. THROUGH TRANSPORTATION

When either Place of Receipt or Place of Delivery is set forth herein and is an inland point (Through Transportation basis), Carrier will provide transportation to/from sea terminal and such inland points, which may well involve transport by rail and, notwithstanding anything herein contained, but always subject to Clause 3, herein. Carrier shall be liable for loss or damage of whatsoever nature and however arising to the following extent, but no further:

a.) Upon proof that the loss or damage arose during a part of carriage made subject to Hague Rules legislation or Protocols amending said Rules, as set forth in Clause 3, above, said legislation shall apply; or

b.) Upon proof that the loss or damage not falling within a) above but concerning which the law of any country, state or subdivision thereof contains compulsorily applicable provisions and would have applied if Merchant had made a separate and direct contract with Carrier or a Participating carrier relative to a particular stage of transport wherein the loss or damage occurred and received as evidence thereof a particular document required to be issued, then the liability of

the Carrier and Participating carrier shall be subject to the provisions of such law.

c.) If it should be determined that Carrier bears any responsibility for loss or damage occurring during the custody of the Participating carrier and be subject to law compulsorily applicable to Participating carrier's contract of carriage, then Carrier shall be entitled to all rights, defenses, immunities, exemptions, limitations of and exonerations from liability of whatsoever nature accorded under such Participating carrier's contract of carriage, tariff, and applicable law, provided however, that nothing contained herein shall be deemed a surrender by Carrier of any rights, defenses and immunities or an increase of any of its exemptions, limitations of or exonerations from liability under this Bill of Lading, the Carrier's applicable tariff or laws applicable or relating thereto.

d.) Except where COGSA is compulsorily applicable it is made applicable by this Bill of Lading. Carrier's liability for loss of or damage to the Goods shall not in any event exceed U.S. DLRS 2.50 per kilo of gross weight of the Goods lost or damaged.

5. SUB-CONTRACTING; BENEFICIARIES

a.) The Carrier shall be entitled to sub-contract on any terms the whole or any part of the carriage, loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by it in relation to the Goods or Containers or other packages or any other goods.

b.) It is understood and agreed that if it should be adjudged that any person or entity other than or in addition to the Carrier is under any responsibility with respect to the Goods or any other goods, regardless of the port or place where any loss or damage shall occur and without regard to whether the Goods covered hereby or any other goods are being handled or are damaged directly or indirectly during any handling, and

even if the Goods or other goods are transported on free in, stowed and/or free out terms, all exemptions, limitations of, and exonerations from liability provided by law or by the Terms and Conditions hereof shall be available to all agents, servants, employees, representatives, all participating (including inland) carriers and all stevedores, terminal operators, warehousemen, crane operators, watchmen, carpenters, ship cleaners, surveyors and all independent contractors whatsoever, in contracting for the foregoing exemptions, limitations of and exonerations from liability, the Carrier is acting as agent and trustee for and on behalf of all persons described above, all of whom shall to this extent be deemed to be a party of the contract evidenced by this Bill of Lading, regardless for whom acting or by whom retained and paid, it being always understood that said beneficiaries are not entitled to any greater or further exemptions, limitations of or exonerations from liability than those that the Carrier has under this Bill of Lading in any given situation.

c.) The Carrier undertakes to procure such services as necessary and shall have the right at its sole discretion to select any mode of land, sea or air transport and to arrange participation by other carriers to accomplish the total or any part of the carriage from Place of Receipt to Place of Delivery, except as may be otherwise provided herein.

d.) No agent or servant of the Carrier shall have power to waive or vary any of the terms hereof unless such waiver or variation is in writing and is specifically authorized or ratified in writing by an officer or director of the Carrier having actual authority to bind the Carrier to such waiver or variation.

* * * *

17. LIMITATION OF LIABILITY

Except as otherwise provided in this Clause and except as provided under any compulsorily applicable law, including, if compulsorily applicable, the Australian Carriage of Goods by

Sea Act 1991, the Carrier's liability shall be limited to U.S. $500 lawful money per package or per customary freight unit unless the nature of the cargo and valuation higher than $500 per package or per customary freight unit shall have been declared by Merchant before shipment and inserted in Bill of Lading, and extra freight paid if required. In such case, if the limitation amount shall exceed declared value, Carrier's liability, if any, shall not exceed declared value.

As to cargo shipped in bulk, the limitation applicable shall be that provided in Section 130-1(5) of COGSA, or such other legislation, convention or law as may be applicable. In no event shall anything herein be construed as a waiver of limitation as to cargo shipped in bulk.

If, on the reverse side hereof, the parties characterize the Container as a package or a lump sum freight is assessed, in either event, liability shall be limited to U.S. $ 500 per Container even if furnished by the Carrier. Notwithstanding the characterization on the reverse side hereof, where a Container is not furnished and/or stuffed by Carrier, each Container shall conclusively be deemed a single package and Carrier's liability limited to $500. In the event this provision is held invalid during a period when compulsory legislation shall apply, it shall nevertheless apply during all non-compulsory periods such as, but not limited to, prior to loading and subsequent to discharge from the Vessel.

Where compulsorily applicable legislation provides a limitation lesser than $500 per package or customary freight unit, such lesser limitation shall apply and nothing herein contained shall be construed as a waiver of a limitation less than $500.

* * * *

Consignor

KIRBY ENGINEERING
JAMES N KIRBY PTY LIMITED
2b6 HORSLEY ROAD
MILPERRA NSW 2214
AUSTRALIA

FBL AU12 – 27086101

NEGOTIABLE FIATA
MULTIMODAL TRANSPORT
BILL OF LADING

Issued subject to UNCTAD/ICC Rules for Multimodal Transport Documents (ICC Publication 481)

Consigned to order of

DELPHI SAGINAW STEERING
PLANT 21, HIGHWAY # 31 SOUTH,
ATHENS ALABAMA USA 35612

Notify address

AIR SEA INT'L FORWARDING INC.
1155 WEST CHESTNUT STREET
UNION NJ 07083 USA

INTERNATIONAL
CARGO CONTROL PTY LTD
Level 5, Bayview Tower, 1753 Botany Road, Banksmeadow NSW 2019
Telephone: 61 - 2 - 316 6211 Facsimile: 61 - 2 - 316 6664

Place of receipt

Ocean vessel | Port of loading

QUEENSLAND STAR V0030 SYDNEY

Port of discharge | Place of delivery

SAVANNAH HUNTSVILLE RAIL

Marks and numbers	Number and kind of packages		Description of goods	Gross weight	Measurement
TOLU 4691971 24485573	1	20' O/T CONT	STC : 2 PCS PARTIAL SHIPMENT MULTI STATION TRANSFER LINE 70 CMS O/HEIGHT	16630 KG	41.00 M3
TOLU 4691256 24485570	1	20' O/T CONT	STC : 2 PCS PARTIAL SHIPMENT MULTI STATION TRANSFER LINE 52 CMS O/HEIGHT	19890 KG	41.00 M3
TOLU 4687900 24485569	1	20' O/T CONT	STC : 2 PCS PARTIAL SHIPMENT MULTI STATION TRANSFER LINE 73 CMS O/HEIGHT	19090 KG	41.00 M3
ECCU 7226201 24485572	1	20' O/T CONT	STC : 2 PCS PARTIAL SHIPMENT MULTI STATION TRANSFER LINE 71 CMS O/HEIGHT	16060 KG	41.00 M3
TOLU 4531516 24485575	1	20' O/T CONT	STC : 1 PC PARTIAL SHIPMENT MULTI STATION TRANSFER LINE 70 CMS O/HEIGHT	14100 KG	41.00 M3

CONT ON PAGE 2

E.C.N. No
1B972312114SVC

FREIGHT PREPAID

SHIPPED ON BOARD - 27/08/97

according to the declaration of the consignor

Declaration of interest of the consignor in timely delivery (Clause 6.2.)

- COPY ONLY -

Declared value for ad valorem rate according to the declaration of the consignor (Causes 7 and 8).

The goods and instructions are accepted and dealt with subject to the Standard Conditions printed overleaf.

Taken in charge in apparent good order and condition, unless otherwise noted herein, at the place of receipt for transport and delivery as mentioned above.

One of these Multimodal Transport Bills of Lading must be surrendered duly endorsed in exchange for the goods. In Witness whereof the original Multimodal Transport Bills of Lading all of this tenor and date have been signed in the number stated below, one of which being accomplished the other(s) to be void.

Freight amount	Freight payable at	Place and date of issue
	SYDNEY	SYDNEY 27/08/97
Cargo insurance through the undersigned ☐ not covered ☐ Covered according to attached Policy	Number of Original FBL's 0 (ZERO)	Stamp and signature
For delivery of goods please apply to: AIR SEA INT'L FORWARDING INC 1155 WEST CHESTNUT STREET SUITE 2-B UNION NEW JERSEY 07083 USA		

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BEST AVAILABLE COPY

66a

THE SHIPPING GROUP

OR PORT TO PORT SHIPMENT

SHIPPER / EXPORTER (COMPLETE NAME AND ADDRESS)
INTERNATIONAL CARGO CONTROL PTY LTD
1753 BOTANY ROAD
BANKSMEADOW NSW 2016
AUSTRALIA

BILL OF LADING NO: SUDU307000560273
BOOKING NO.
EXPORT REFERENCES: LLOYDS LIST CODE:7226275 3/13

CONSIGNEE (COMPLETE NAME & ADDRESS)
AIR SEA INT'L FORWARDING INC
1155 WEST CHESTNUT STREET
SUITE 2-B
UNION, NEW JERSEY 07083
U.S.A.

FORWARDING AGENT - REFERENCES

POINT AND COUNTRY OF ORIGIN

NOTIFY PARTY (COMPLETE NAME & ADDRESS)

DOMESTIC ROUTING &/OR EXPORT INSTRUCTIONS (ALSO NOTIFY

	PLACE OF RECEIPT	A CODE	D CODE
	SYDNEY TERMINAL		

VESSEL	VOYAGE	PORT OF LOADING	TYPE OF MOVE	ORIGINALS TO BE RELEASED AT
QUEENSLAND STAR	030N	SYDNEY	HOUSE HOUSE	SYDNEY

PORT OF DISCHARGE FROM VESSEL	PLACE OF DELIVERY	SHIPPER INFORMATION / NOT PART OF THIS BL CONTRACT
SAVANNAH GA	HUNTSVILLE AL	

PARTICULARS FURNISHED BY SHIPPER

MARKS AND NUMBERS	NO. OF PKGS	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASUREMENT
CONTAINER SEAL-NUMBERS TARE SIZE TYPE TOLU4694977 24485573 2250 20 OT	1	CONTAINER - SAID TO CONTAIN 2 PIECES PARTIAL SHIPMENT MULTI STATION TRANSFER LINE 70CMS O/HEIGHT	16630 KGS	41.000 M3
CONTAINER SEAL-NUMBERS TARE SIZE TYPE TOLU4692254 24485570 2250 20 OT	1	CONTAINER - SAID TO CONTAIN 2 PIECES PARTIAL SHIPMENT MULTI STATION TRANSFER LINE 52CMS O/HEIGHT	19890 KGS	41.000 M3

COPY not negotiable

TOTAL NO OF PKGS	DECLARED VALUE	
10		IF A DECLARED VALUE IS ENTERED IT WILL BE VOID AND OF NO EFFECT UNLESS (1) A DECLARATION OF VALUE IS MADE IN WRITING PRIOR TO SHIPMENT AND (2) THE AD VALOREM RATE HAS BEEN PAID AT OR PRIOR TO TOTAL OF GOODS RECEIVED FOR SHIPMENT (SEE CLAUSE 17 ON REVERSE SIDE. IF CHECK 21 PAYMENT OF AD VALOREM RATE FAILS TO CLEAR FOR ANY REASON WHATSOEVER THIS BOX WILL BE VOID

FREIGHT CHARGES	RATE/TON	PER	RATE	PREPAID	COLLECT	CURRENCY / RATE OF EXCHANGE

NO. ORIG. B/L	TOTAL PREPAID	TOTAL COLLECT	FREIGHT PAYABLE AT
			SYDNEY

IN WITNESS WHEREOF the number of original Bills of Lading stated on the face hereof to this shipment have been signed, one of which being accomplished, the others to stand void

PAGE 1

APPLICABLE ONLY WHEN USED FOR MULTIMODAL OR THROUGH TRANSPORTATION

B/L CONTINUED ON PAGE 2

Tariff Item No. 842825

PLACE AND DATE OF ISSUE SYDNEY 27.08.9

COLUMBUS LINE AUSTRALIA, PTY. LTD.
A.C.N : 000 807 858

Signed for Columbus Line Australia Pty Ltd A.C.N. 000 807 858 as agent for the

Definitions
- «Freight Forwarder» means the Multimodal Transport Operator who issues this FBL and is named on the face of it and assumes liability for the performance of the multimodal transport contract as a carrier.
- «Merchant» means and includes the Shipper, the Consignor, the Consignee, the Holder of this FBL, the Receiver and the Owner of the Goods.
- «Consignor» means the person who concludes the multimodal transport contract with the Freight Forwarder.
- «Consignee» means the person entitled to receive the goods from the Freight Forwarder.
- «Taken in charge» means that the goods have been handed over to and accepted for carriage by the Freight Forwarder at the place of receipt evidenced in this FBL.
- «Goods» means any property including live animals as well as containers, pallets or similar articles of transport or packaging not supplied by the Freight Forwarder, irrespective of whether such property is to be or is carried on or under deck.

1. Applicability
Notwithstanding the heading «FIATA Multimodal Transport Bill of Lading (FBL)» these conditions shall also apply if only one mode of transport is used.
2. Issuance of this FBL
2.1. By issuance of this FBL the Freight Forwarder
a) undertakes to perform and/or in his own name to procure the performance of the entire transport, from the place at which the goods are taken in charge (place of receipt evidenced in this FBL) to the place of delivery designated in this FBL;
b) assumes liability as set out in these conditions.
2.2. Subject to the conditions of this FBL, the Freight Forwarder shall be responsible for the acts and omissions of his servants or agents acting within the scope of their employment, or any other person of whose services he makes use for the performance of the contract evidenced by this FBL, as if such acts and omissions were his own.
3. Negotiability and title to the goods
3.1. This FBL is issued in a negotiable form unless it is marked «non negotiable». It shall constitute title to the goods and the holder, by endorsement of this FBL, shall be entitled to receive or to transfer the goods herein mentioned.
3.2. The information in this FBL shall be prima facie evidence of the taking in charge by the Freight Forwarder of the goods as described by such information unless a contrary indication, such as «shipper's weight, load and count», «shipper-packed container» or similar expressions, has been made in the printed text or superimposed on this FBL. However, proof to the contrary shall not be admissible when the FBL has been transferred to the consignee for valuable consideration who in good faith has relied and acted thereon.
4. Dangerous Goods and Indemnity
4.1. The Merchant shall comply with rules which are mandatory according to the national law or by reason of International Convention, relating to the carriage of goods of a dangerous nature, and shall in any case inform the Freight Forwarder in writing of the exact nature of the danger, before goods of a dangerous nature are taken in charge by the Freight Forwarder and indicate to him, if need be, the precautions to be taken.
4.2. If the Merchant fails to provide such information and the Freight Forwarder is unaware of the dangerous nature of the goods and the necessary precautions to be taken and if, at any time, they are deemed to be a hazard to life or property, they may at any place be unloaded, destroyed or rendered harmless, as circumstances may require, without compensation. The Merchant shall indemnify the Freight Forwarder against all loss, damage, liability, or expense arising out of their being taken in charge, or their carriage, or of any service incidental thereto.
The burden of proving that the Freight Forwarder knew the exact nature of the danger constituted by the carriage of the said goods shall rest on the Merchant.
4.3. If any goods shall become a danger to life or property, they may in like manner be unloaded or landed at any place or destroyed or rendered harmless. If such danger was not caused by the fault and neglect of the Freight Forwarder he shall have no liability and the Merchant shall indemnify him against all loss, damage, liability and expense arising therefrom.
5. Description of Goods and Merchant's Packing and Inspection
5.1. The Consignor shall be deemed to have guaranteed to the Freight Forwarder the accuracy, at the time the goods were taken in charge by the Freight Forwarder, of all particulars relating to the general nature of the goods, their marks, number, weight, volume and quantity and, if applicable, to the dangerous character of the goods, as furnished by him or on his behalf for insertion on the FBL.
The Consignor shall indemnify the Freight Forwarder against all loss, damage and expense resulting from any inaccuracy or inadequacy of such particulars.
The Consignor shall remain liable even if the FBL has been transferred by him.
The right of the Freight Forwarder to such an indemnity shall in no way limit his liability under this FBL to any person other than the Consignor.
5.2. The Freight Forwarder shall not be liable for any loss, damage or expense caused by defective or insufficient packing of goods or by inadequate loading or packing within containers or other transport units when such loading or packing has been performed by the Merchant or on his behalf by a person other than the Freight Forwarder, or by the defect or unsuitability of the containers or other transport units supplied by the Merchant, or in respect by the Freight Forwarder if a defect or unsuitability of the container or other transport unit would have been apparent upon reasonable inspection by the Merchant. The Merchant shall indemnify the Freight Forwarder against all loss, damage, liability and expense so caused.
6. Freight Forwarder's Liability
6.1. The responsibility of the Freight Forwarder for the goods under these conditions covers the period from the time the Freight Forwarder has taken the goods in his charge to the time of their delivery.
6.2. The Freight Forwarder shall be liable for loss of or damage to the goods as well as for delay in delivery if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in Clause 7.1., unless the Freight Forwarder proves that no fault or neglect of his own, his servants or agents or any other person referred to in Clause 2.2. has caused or contributed to such loss, damage or delay. However, the Freight Forwarder shall only be liable for loss following from delay in delivery if the Consignor has made a declaration of interest in timely delivery which has been accepted by the Freight Forwarder and stated in this FBL.
6.3. Arrival times are not guaranteed by the Freight Forwarder. However, delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon or, in the absence of such agreement, within the time which would be reasonable to require of a diligent Freight Forwarder, having regard to the circumstances of the case.
6.4. If the goods have not been delivered within ninety consecutive days following such date of delivery as determined in Clause 6.3., the claimant may, in the absence of evidence to the contrary, treat the goods as lost.
6.5. When the Freight Forwarder establishes that, in the circumstances of the case, the loss or damage could be attributed to one or more causes or events specified in a – e of the present clause, it shall be presumed that it was so caused, always provided, however, that the claimant shall be entitled to prove that the loss or damage was not, in fact, caused wholly or partly by one or more of such causes or events:
a) an act or omission of the Merchant, or person other than the Freight Forwarder acting on behalf of the Merchant or from whom the Freight Forwarder took the goods in charge;
b) insufficiency or defective condition of the packaging or marks and/or numbers;
c) handling, loading, stowage or unloading of the goods by the Merchant or any person acting on behalf of the Merchant;
d) inherent vice of the goods;
e) strike, lockout, stoppage or restraint of labour.
6.6. Defences for carriage by sea or inland waterways
Notwithstanding Clauses 6.2., 6.3. and 6.4. the Freight Forwarder shall not be liable for loss, damage or delay in delivery with respect to goods carried by sea or inland waterways when such loss, damage or delay during such carriage has been caused by:
a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;
b) fire, unless caused by the actual fault or privity of the carrier, however, always provided that whenever loss or damage has resulted from unseaworthiness of the ship, the Freight Forwarder can prove that due diligence has been exercised to make the ship seaworthy at the commencement of the voyage.
7. Paramount Clauses
7.1. These conditions shall only take effect to the extent that they are not contrary to the mandatory provisions of International Conventions or national law applicable to the contract evidenced by this FBL.
7.2. The Hague Rules contained in the International Convention for the unification of certain rules relating to Bills of Lading, dated Brussels 25th August 1924, or in those countries where there are already in force the Hague-Visby Rules contained in the Protocol of Brussels, dated 23rd February 1968, as enacted in the Country of Shipment, shall apply to all carriage of goods by sea and also to the carriage of goods by inland waterways, and such provisions shall apply to all goods whether carried on deck or under deck.
7.3. The Carriage of Goods by Sea Act of the United States of America (COGSA) shall apply to the carriage of goods by sea, whether on deck or under deck, if compulsorily applicable to this FBL or would be applicable but for the goods being carried on deck in accordance with a statement on this FBL.
8. Limitation of Freight Forwarder's Liability
8.1. Assessment of compensation for loss of or damage to the goods shall be made by reference to the value of such goods at the place and time they are delivered to the consignee or at the place and time when, in accordance with this FBL, they should have been so delivered.
8.2. The value of the goods shall be determined according to the current commodity exchange price or, if there is no such price, according to the current market price or, if there are no such prices, by reference to the normal value of goods of the same name and quality.

be or become liable for any loss of or damage to the goods in an amount exceeding the equivalent of 666.67 SDR per package or unit or 2 SDR per kilogramme of gross weight of the goods lost or damaged, whichever is the higher, unless the nature and value of the goods shall have been declared by the Consignor and accepted by the Freight Forwarder before the goods have been taken in his charge, or the ad valorem freight rate paid, and such value is stated in the FBL by him, then such declared value shall be the limit.
8.4. Where a container, pallet or similar article of transport is loaded with more than one package or unit, the packages or other shipping units enumerated in the FBL as packed in such article of transport are deemed packages or shipping units. Except as aforesaid, such article of transport shall be considered the package or unit.
8.5. Notwithstanding the above mentioned provisions, if the multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the Freight Forwarder shall be limited to an amount not exceeding 8.33 SDR per kilogramme of gross weight of the goods lost or damaged.
8.6. a) When the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law would have provided another limit of liability if a separate contract of carriage had been made for that particular stage of transport, then the limit of the Freight Forwarder's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law.
b) Unless the nature and value of the goods shall have been declared by the Merchant and inserted in this FBL, and the ad valorem freight rate paid, the liability of the Freight Forwarder under COGSA, where applicable, shall not exceed US$ 500 per package or, in the case of goods not shipped in packages, per customary freight unit.
8.7. If the Freight Forwarder is liable in respect of loss following from delay in delivery, or consequential loss or damage other than loss of or damage to the goods, the liability of the Freight Forwarder shall be limited to an amount not exceeding the equivalent of twice the freight under the multimodal contract for the multimodal transport under this FBL.
8.8. The aggregate liability of Freight Forwarder shall not exceed the limits of liability for total loss of the goods.
8.9. The Freight Forwarder is not entitled to the benefit of the limitation of liability if it is proved that the loss, damage or delay in delivery resulted from a personal act or omission of the Freight Forwarder done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.
9. Applicability to Actions in Tort
These conditions apply to all claims against the Freight Forwarder relating to the performance of the contract evidenced by this FBL, whether the claim be founded in contract or in tort.
10. Liability of Servants and other Persons
10.1. These conditions apply whenever claims relating to the performance of the contract evidenced by this FBL are made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract, whether such claims are founded in contract or in tort, and the aggregate liability of the Freight Forwarder and of such servants, agents or other persons shall not exceed the limits in clause 8.
10.2. In entering into this contract as evidenced by this FBL, the Freight Forwarder, to the extent of these provisions, does not only act on his own behalf, but also as agent or trustee for such persons, and such persons shall to this extent be or be deemed to be parties to this contract.
10.3. However, if it is proved that the loss of or such loss or damage to the goods resulted from a personal act or omission of such a person referred to in Clause 10.1., done with intent to cause damage, or recklessly and with knowledge that damage would probably result, such person shall not be entitled to benefit of limitation of liability provided for in Clause 8.
10.4. The aggregate of the amounts recoverable from the Freight Forwarder and the persons referred to in Clauses 2.2. and 10.1. shall not exceed the limits provided for in these conditions.
11. Method and Route of Transportation
Without notice to the Merchant, the Freight Forwarder has the liberty to carry the goods on or under deck and to choose or substitute the means, route and procedure to be followed in the handling, stowage, storage and transportation of the goods.
12. Delivery
12.1. Goods shall be deemed to be delivered when they have been handed over or placed at the disposal of the Consignee or his agent in accordance with this FBL, or when the goods have been handed over to any authority or other party to whom, pursuant to the law or regulation applicable at the place of delivery, the goods must be handed over, or such other place at which the Freight Forwarder is entitled to call upon the Merchant to take delivery.
12.2. The Freight Forwarder shall also be entitled to store the goods at the sole risk of the Merchant, and the Freight Forwarder's liability shall cease, and the cost of such storage shall be paid, upon demand, by the Merchant to the Freight Forwarder.
12.3. If at any time the carriage under this FBL is or is likely to be affected by any hindrance or risk of any kind (including the condition of the goods) not arising from any fault or neglect of the Freight Forwarder or a person referred to in Clause 2.2. and which cannot be avoided by the exercise of reasonable endeavours the Freight Forwarder may:
abandon the carriage of the goods under this FBL and, where reasonably possible, place the goods or any part of them at the Merchant's disposal at any place which the Freight Forwarder may deem safe and convenient, whereupon delivery shall be deemed to have been made, and the responsibility of the Freight Forwarder in respect of such goods shall cease.
In any event, the Freight Forwarder shall be entitled to full freight under this FBL and the Merchant shall pay any additional costs resulting from the above mentioned circumstances.
13. Freight and Charges
13.1. Freight shall be paid in cash, without any reduction or deferment on account of any claim, counterclaim or set-off, whether prepaid or payable at destination.
Freight shall be considered as earned by the Freight Forwarder at the moment when the goods have been taken in his charge, and not to be returned in any event.
13.2. Freight and all other amounts mentioned in this FBL are to be paid in the currency named in this FBL or, at the Freight Forwarder's option, in the currency of the country of dispatch or destination at the highest rate of exchange for bankers sight bills current for prepaid freight on the day of dispatch and for freight payable at destination on the day when the Merchant is notified on arrival of the goods there or on the date of withdrawal of the delivery order, whichever rate is the higher, or at the option of the Freight Forwarder on the date of this FBL.
13.3. All dues, taxes and charges or other expenses in connection with the goods shall be paid by the Merchant.
Where equipment is supplied by the Freight Forwarder, the Merchant shall pay all demurrage and charges which are not due to a fault or neglect of the Freight Forwarder.
13.4. The Merchant shall reimburse the Freight Forwarder in proportion to the amount of freight for any costs for deviation or delay or any other increase of costs of whatever nature caused by war, warlike operations, epidemics, strikes, government directions or force majeure.
13.5. The Merchant warrants the correctness of the declaration of contents, insurance, weight, measurements or value of the goods but the Freight Forwarder has the liberty to have the contents inspected and the weight, measurements or value verified. If on such inspection it is found that the declaration is not correct it is agreed that a sum equal either to five times the difference between the correct figure and the freight charged, or to double the correct freight less the freight charged, whichever sum is the smaller, shall be payable as liquidated damages to the Freight Forwarder for his inspection costs and losses of freight on other goods notwithstanding any other sum having been stated on this FBL as freight payable.
13.6. Despite the acceptance by the Freight Forwarder of instructions to collect freight, charges or other expenses from any other person in respect of the transport under this FBL, the Merchant shall remain responsible for such monies on receipt of evidence of demand and the absence of payment for whatever reason.
14. Lien
The Freight Forwarder shall have a lien on the goods and any documents relating thereto for any amount due at any time to the Freight Forwarder from the Merchant including storage fees and the cost of recovering same, and may enforce such lien in any reasonable manner which he may think fit.
15. General Average
The Merchant shall indemnify the Freight Forwarder in respect of any claims of a General Average nature which may be made on him and shall provide such security as may be required by the Freight Forwarder in this connection.
16. Notice
16.1. Unless notice of loss of or damage to the goods, specifying the general nature of such loss or damage, is given in writing by the consignee to the Freight Forwarder when the goods are delivered to the consignee in accordance with clause 12, such handing over is prima facie evidence of the delivery by the Freight Forwarder of the goods as described in this FBL.
16.2. Where the loss or damage is not apparent, the same prima facie effect shall apply if notice in writing is not given within 6 consecutive days after the day when the goods were delivered to the consignee in accordance with clause 12.
17. Time bar
The Freight Forwarder shall, unless otherwise expressly agreed, be discharged of all liability under these conditions unless suit is brought within 9 months after the delivery of the goods, or the date when the goods should have been delivered, or the date when in accordance with clause 6.4. failure to deliver the goods would give the consignee the right to treat the goods as lost.
18. Partial Invalidity
If any clause or a part thereof is held to be invalid, the validity of this FBL and the remaining clauses or a part thereof shall not be affected.
19. Jurisdiction and applicable law
Actions against the Freight Forwarder may be instituted only in the place where the Freight Forwarder has his place of business as stated on the reverse of this FBL and shall be decided according to the law of the country in which that place of business is situated.

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COLUMBUS

TERMS AND CONDITIONS

1. DEFINITIONS

(a) "Carrier" means Columbus Line, which is the trade name used by Hamburg Amerikanische Dampfschiffahrts-Gesellschaft Eggert & Amsinck, Ost-West-Service Hamburg, Germany, the Carrier named on the face side hereof, the vessel, her owner, operator, demise charterer, time charterer, voyage charterer, space or slot charterer, sub-carrier and substitute carrier, whether acting as Carrier or bailee.

(b) "Charges" means freights, dead freights, demurrage and all expenses and money obligations incurred and payable by the Merchant.

(c) "Container" means any container, van, trailer, flatbed, transportable tank, railroad car, platform, flat, pallet, skid, platform, crate, sling-load or any similar article of transport.

(d) "Goods" means the cargo received from the shipper and described on the face side hereof and any Container not supplied by or on behalf of the Carrier.

(e) "Merchant" means the shipper, consignee, receiver, holder of this Bill of Lading, owner of the cargo or person entitled to the possession of the cargo and the servants and agents of any of these, all of whom shall be jointly and severally liable to the Carrier for the payment of all Charges, and for the performance of the obligations of any of them under this Bill of Lading.

(f) "On Board" or similar words endorsed on this Bill of Lading mean that in a Port to Port shipment, the Goods have been loaded on board the Vessel or are in the custody of the relevant carrier; and in the event of intermodal transportation, if the originating carrier is the relevant carrier, means that the Goods have been loaded on board rail cars or another relevant conveyance at the Place of Receipt or are in the custody of a Participating carrier intermediate to the Port of Loading named on the reverse side.

(g) "Participating carrier/Lessee" means any other carrier by water, land or air, performing any part of the carriage, whether acting as sub-carrier, substitute carrier or bailee.

(h) "Vessel" means the ocean vessel named on the face side hereof, and any substitute, feeder, barge, or other means of conveyance by water used in whole or in part performance of the carriage.

2. CARRIER'S TARIFF

(a) Goods carried hereunder are subject to all terms and conditions of Carrier's applicable tariff, etc. filed with the Federal Maritime Commission, Interstate Commerce Commission or other regulatory body which governs a particular portion of the carriage hereunder, terms and conditions and liability incorporated herein as part of the Terms and Conditions of this Bill of Lading. Copies of relevant provisions of applicable tariff(s) are available from Carrier, Federal Maritime Commission, Interstate Commerce Commission or other regulatory body upon request. In the event of any conflict between the terms and provisions of such tariff(s) and the Terms and Conditions of this Bill of Lading, this Bill of Lading shall prevail.

3. PERFORMANCE; (I) APPLICABLE LEGISLATION

(a) Carrier shall not be responsible for the Goods from the time received at the Port of Loading (and subsequent for should have been delivered at the Port of Discharge and also during any previous or subsequent period of carriage performed under this Bill of Lading, except to the provisions of any legislation compulsorily applicable to this Bill of Lading (1) which is subject to the Hague Rules contained in the International Convention for the Unification of Certain Rules Relating to Bills of Lading, dated at Brussels, August 25, 1924, including subsequent themes, such as the Carriage of Goods by Sea Act of the United States (hereinafter "COGSA") or (2) which gives effect to the said Rules or amended by the Protocols to Amend the International Convention for the Unification of Certain Rules of Law Relating Into Bills of Lading, dated at Brussels, February 23, 1968 (the "Visby Amendments") and December 21, 1979 (the "SDR Protocol"), including, if compulsorily applicable, the Australian Carriage of Goods by Sea Act, 1991 or (3) where the Hague Rules, subsequent themes or Hague Visby Amendments (including the SDR Protocol) are not compulsorily applicable, this Bill of Lading shall take effect subject to any National law which may be in force at the Port of Loading or place of issue of the Bill of Lading making the United Nations Convention on the Carriage of Goods by Sea 1978 (the "Hamburg Rules") compulsorily applicable to this Bill of Lading, in which case this Bill of Lading shall (whatever which subject to the Hamburg Rules which shall nullify any stipulation derogating in any manner to the detriment of the Merchant. The applicable legislation shall govern during the Carrier's extra period of responsibility. In the absence of compulsorily applicable legislation, COGSA shall govern.

(b) The Carrier shall, notwithstanding which legislation is applicable under a) above, be entitled to the benefit of Sections 4281 through 4287 of the Revised Statutes of the United States and amendments thereto, as if the same were expressly set out herein.

(c) (i) The rights, defences, immunities, exemptions, limitations of and exonerations from liability of whatsoever nature, provided for in this Bill of Lading, or (as far as may be permissible) under statute, shall apply in any action or proceeding brought against the Carrier, whether in contract, tort or equity.

4. THROUGH TRANSPORTATION

(a) Where either Place of Receipt or Place of Delivery is not both herein and is an inland point (through transportation basis), Carrier will give one transportation between SRS intermodal and such inland points, which may well involve transport by rail and, notwithstanding anything herein contained, but always subject to Clause 3, hereof, Carrier shall be liable for loss or damage of whatsoever nature and however arising to the following extent, but no further:

(i) Upon proof that the loss or damage arose during a part of the carriage not subject to the Hague Rules legislation or Protocols amending said Rules, as set forth in Clause 3, hereof, said legislation shall apply; or

(ii) Upon proof that the loss or damage not falling within a) above but concerning which the law of any country, state or subdivision thereof contains compulsorily applicable provisions and would have applied if Merchant had made a separate and direct contract with Carrier or a Participating carrier relative to a particular stage of transport wherein the loss or damage occurred and received as evidence thereof a particular document required to be issued, then the liability of the Carrier and Participating carrier shall be subject to the provisions of such law.

(b) If it should be determined that Carrier bears any responsibility for loss or damage occurring during the custody of the Participating carrier and be subject to law compulsorily applicable to Participating carrier's contract of carriage, then Carrier shall be entitled to all rights, defences, immunities, exemptions, limitations of and exonerations from liability of whatsoever nature accorded under such Participating carrier's contract of carriage, tariff, and applicable law, provided however, that nothing contained herein shall be deemed a surrender by Carrier of any rights, defences and immunities or an increase of any of its exemptions, limitations of or exonerations from liability under this Bill of Lading, the Carrier's applicable tariff or laws applicable or relating thereto.

(c) Except where COGSA is compulsorily applicable or is made applicable by this Bill of Lading, Carrier's liability for loss of or damage to the Goods shall not in any event exceed U.S.DLRS. 2.50 per kilo of gross weight of the Goods lost or damaged.

5. SUB-CONTRACTING; BENEFICIARIES

(a) The Carrier shall be entitled to sub-contract on any terms the whole or any part of the carriage, loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by it in relation to the Goods or Containers or other packages or any other goods.

(b) It is understood and agreed that if it should be adjudged that any person or entity other than or in addition to the Carrier is under any responsibility with respect to the Goods or any other goods, regardless of the port or place where any loss or damage shall occur and whether the Goods covered hereby or any other goods are being handled or are damaged directly or indirectly during any handling, and even if the Goods or other goods are transported on free in, stowed and/or free out terms, all exemptions, limitations, defences and exemptions from liability provided by law or by the terms and Conditions hereof shall be available to all agents, servants employees, representatives, all Participating (including inland) carriers and all stevedores, terminal operators, warehousemen, crane operators, watchmen, carpenters, ship cleaners, lashers and all subcontractors, carriage's wholesomer, in connection for the foregoing exemptions, limitations of and exemptions from liability the Carrier is acting as agent and trustee for and on behalf of said persons described above, all of whom shall to the extent be deemed to be a party to the contract evidenced by this Bill of Lading, regardless for whom acting or by whom employed and paid. It being always understood that said beneficiaries are not entitled to any greater or further exemptions, limitations of or exonerations from liability than those that the Carrier has under this Bill of Lading in any given situation.

(c) The Carrier undertakes to procure such services as necessary and shall have the right at its sole discretion to select any mode of load, sea or air transport and to arrange transhipment by other carriers to accomplish the total or any part of the carriage from Place of Receipt to Place of Delivery, except as may be otherwise provided herein.

(d) No agent or servant of the Carrier shall have power to waive or vary any of the terms hereof unless such waiver or variation is in writing and is specifically authorized or ratified by an officer or director of the Carrier having actual authority to bind the Carrier to such waiver or variation.

6. WARRANTY

(a) The Merchant warrants that in agreeing to the terms and Conditions hereof, he is, or has the authority of, the person owning or entitled to the possession of the Goods and this Bill of Lading.

7. OPTION OF INSPECTION

(a) The Carrier shall be entitled, but not obligated to open any Container at any time and to inspect contents, if it appears that the contents or any part thereof cannot safely or properly be carried or carried further, either at all or without incurring additional expense. Carrier may abandon the transportation and/or take any necessary steps and/or incur reasonable additional expenses to construe the carriage or store the Goods which shall be deemed to constitute due delivery hereunder. The Merchant shall indemnify the Carrier against any reasonable additional Charges so incurred, unless due solely to Carrier's fault.

(b) However, before taking any of the above steps, the Carrier shall, if feasible, make all reasonable attempts to notify all cargo interests identified in Bill of Lading, otherwise known to Carrier, to have any interest in Goods of its intention to take such steps.

8. DESCRIPTION OF GOODS; RESPONSIBILITY OF MERCHANT AND GOODS

(a) Neither Carrier, nor its agents and servants, shall be liable for, or precluded as to, correctness of any marks, descriptions or other representations furnished or made by or on behalf of Merchant or accessories on the Goods or the packages or Containers in which Goods are stuffed, stowed and carried, neither Container and Carrier does not represent quantity, weight, condition, quality or conformance of such concerns recorded in list of Lading to be accurate or binding, stowing and delivering to the proper.

(b) (1) The Terms and Conditions of this Bill of Lading shall govern Carrier's responsibility in connection with or arising out of the supply of a Container to Merchant, whether supplied before or after Goods are received by the Carrier or delivered to Merchant.

(2) If the Container has been stuffed by or on behalf of Merchant,

(A) Carrier shall not be liable for loss of or damage to the Goods;

(i) caused by manner in which Container had been stuffed;

(ii) caused by unsuitability of Goods for Container or Containers;

(iii) caused by unsuitability or defective condition of Container

provided that where Container has been supplied by or on behalf of the Carrier, this paragraph (a) shall only apply if the unsuitability or defective condition arose:

(i) without any want of due diligence on Carrier's part or

(ii) would have been apparent upon reasonable examination by Merchant at or prior to time Container was stuffed;

(iii) if Container is not sealed at commencement of Carriage except where Carrier has agreed to seal Container.

(B) Merchant shall indemnify, irrevocably and hold Carrier harmless against any loss, damage, claim, liability or expense whatsoever arising from one or more of matters mentioned in (A) above except for (A) (iii) (a).

(3) Where Carrier is instructed to provide a Container, in absence of a written request to contrary, Carrier is not under an obligation to provide a Container of particular type or quality.

(4) When a Container is to be stripped by or on behalf of the Merchant, Merchant shall promptly strip, or cause to be stripped, Container and take delivery of its contents, irrespective of condition of Goods. Further, Merchant shall be and remain liable for any loss, damage or expense of whatsoever nature arising or resulting from stripping howsoever occurring, including but not limited to loss or damage to the Goods, Container, Vessel or conveyance or to other Cargo, property or persons, whether such loss or damage is then evident or later manifests itself.

(c) When any Container utilized is owned or leased by Carrier, and used returned to Carrier's custody, Merchant shall be and remain liable, at tariff rates, for any extra demurrage time allowed for the use of such Container, and for any loss, damage or expenses incurred by Carrier as a result of failure to return the Container to Carrier in the same sound condition and state of cleanliness as when received by or on behalf of Merchant, even if a deviation caused by Goods does not then manifest itself and/or results in loss, damage or expense at a subsequent time.

(f) Merchant agrees to be responsible for all expenses of any nature incurred while the Goods and Containers are in the custody of Carrier or any Participating Carrier, their agents or servants, including but not limited to repairs, reconditioning, dismantling, detention, liens and taxes, civil or criminal, and whether charged to the Goods or Containers or levied upon Carrier, Vessel, other conveyance, Participating carrier, as consequence, their agents or servants, which result for the acts or omissions to act on part of Merchant, its agents or servants, or third-parties for whom Carrier, Participating carrier, their agents or servants, are not responsible, and to submit to jurisdiction of any court, tribunal or other body before whom Carrier may be brought.

(g) Carrier's prior written consent in writing required for dangerous or hazardous Goods, which must be distinctly marked as such on outside of Goods and container.

(h) Merchant warrants that it has complied with all Statutes, ordinances, regulations and requirements of Customs, Port and any other Authorities relative to the Goods, Containers, documentation and any other matters affecting or in any way relating thereto.

9. CONTAINERIZED CARGO

Goods may be stowed by Carrier in Containers, and Containers, whether stowed by Carrier or received fully stowed, may be carried on or under deck without notice, and Merchant expressly agrees that cargo stowed in a Container and carried on deck is considered for all legal purposes to be Cargo stowed under deck. Goods stowed in Containers on deck shall be subject to the legislation referred to in Clause 3, hereof and will contribute and/or receive compensation in General Average, as the case may be.

10. CONTAINERS WITH HEATING OR REEFER APPARATUS

Containers with temperature or atmosphere-controlled apparatus for heating, refrigeration or otherwise will not be furnished unless expressly contracted for in writing at time of booking and, when furnished, may entail extra and increased Charges. In absence of an express request, it shall be conclusively presumed that use of a dry container is appropriate for the Goods.

Merchants must provide Carrier with desired temperature range when delivering Containers to Carrier, and Carrier in exercise due diligence to maintain the temperature within a reasonable range while in its custody or control. The Carrier does not accept any responsibility for the functioning of temperature or atmosphere controlled Containers not owned or leased by Carrier or related companies.

11. DECK CARGO

Deck cargo (except that carried in Containers on deck) and live animals are accepted and carried solely at Merchant's risk (including, whether or not the result of unseaworthiness) and the Carrier will not in any event be liable for any loss or damage for or from which he is exempted, howsoever or occasioned by negligence, default or breach of contract of carriage, even if such loss or damage arises from unseaworthiness or due to the fault of the Carrier, any warranty of seaworthiness in the premises being hereby waived. Except as may be otherwise provided, such shipments shall be deemed Goods and shall be subject to all terms and Conditions of this Bill of Lading.

12. METHODS AND ROUTES OF TRANSPORTATION; LIBERTIES

Without derogating from the Carrier's obligation to carry the Goods to the Port of Discharge subject to these Terms and Conditions, with respect to the Goods or Containers or other packages, the Carrier may at any time and without notice to the Merchant:

(a) use any means of transport (sea, land and/or air) or storage whatsoever;

(b) transship or carry on another vessel or conveyance or by any other means of transport than that named on the reverse side hereof;

(c) carry Goods on or under deck at its option;

(d) proceed by any route at its sole and absolute discretion and whether the nearest, most direct, customary or advertised route or not or not at varying or local ports;

(e) proceed to or stay at any place whatsoever more or other than and or any ports of call on any part, whether scheduled or not;

(f) depart and/or store at any place whatsoever, at base or afloat, in the open or covered;

(g) proceed with or without pilots;

(h) carry livestock, contraband, explosives, munitions, warlike stores, dangerous or hazardous Goods or Goods of any and all kinds;

(i) deviate or stop at any unscheduled port for bunkers, repairs or for any purpose whatsoever;

(j) comply with any orders, directions or recommendations given by any government or authority or by any person or body acting or purporting to act with the authority of any government or authority or having under the terms of the insurance on the vessel or other conveyance employed by the Carrier the right to give such orders, directions or recommendations;

(k) take any other steps or perform any acts reasonable in the Carrier under the circumstances.

The liberties set out in subparagraphs a) through k) may be exercised by any purpose whatsoever even if not connected with the carriage covered by this Bill of Lading, and any action taken or omitted to be taken, and any delay arising therefrom, shall be deemed to be within the contractual and contemplated carriage and not be an unreasonable deviation.

In no circumstance whatsoever shall the Carrier be liable for direct, indirect or consequential loss or damage caused by delay.

13. DELIVERY

If delivery of the Goods or Containers or other packages or any part thereof is not taken by the Merchant when and where and at such time and place as the Carrier is entitled to, then the Merchant take delivery, they shall be conclusive to have been delivered to the Merchant, and the Carrier may, at its option, depart to its lien and without notice, elect to have same remain where they are or send to a warehouse or other place, wharf or depository, always at the risk and expense of the Merchant and Goods.

In South America and Caribbean areas that is, in those countries/territories where the Hamburg Rules are compulsorily applicable it is hereby agreed that the time for delivery of the goods shall be ten (10) months from the date of shipment.

14. CHARGES, INCLUDING FREIGHT

The Charges payable hereunder have been calculated on the basis of particulars furnished by or on behalf of the Merchant. The Carrier shall, at any time, be entitled to inspect, reweigh, remeasure or revalue the consignment and, if any of the particulars furnished by the Merchant are found to be incorrect, the Charges shall be adjusted accordingly, and the Merchant shall be responsible to pay the correct Charges and all expenses incurred by the Carrier in checking said particulars or any of them.

Charges shall be deemed earned on acceptance of the Goods or Containers or other packages for shipment by the Carrier and shall be paid by the Merchant in full, without any offset, counterclaim or deduction, when and/or wherever and in what currency and in what form, and shall be non-returnable in any event.

The Merchant shall remain responsible for all Charges, regardless whether the Bill of Lading be marked, or words of symbols, "Prepaid", "to be Prepaid" or "Collect".

In allowing for any deviation with respect to the Goods, the Carrier shall be entitled to the exclusive profit of the Merchant for all purposes, and any payment of Charges to other than the Carrier shall not, in any event, be considered payment to the Carrier.

The Merchant shall defend, indemnify and hold the Carrier, any Participating carrier, their agents and servants, harmless from and against all liability, loss, damage and expense which may be sustained by or incurred by the Carrier in connection therewith.

15. CARRIER'S LIEN

Carrier shall have a lien on Goods and any Charges and the proceeds in any manner for all sums due under this contract or any other contract or understanding to which Merchant (as defined herein) was party or otherwise involved, which lien shall also extend to General Average contributions, salvage and any and all necessary expenditures, advances or payments, and shall survive delivery. Such lien may be enforced by Carrier by public or private sale at any time and in any manner, without notice to Merchant. Carrier may apply proceeds of any sale to Merchant's account, holding any surplus subject to claims against it. Merchant shall remain liable for any deficiency. Carrier shall have a lien on any property of Merchant in its possession for any amount owing to Carrier from Merchant, whether or not relating to the Goods.

16. LOADING, DISCHARGING AND DELIVERY

Merchant shall load, stow, trim, lash, secure, dunnage, tally, count, discharge and take delivery of Goods and Containers within such reasonable time as the Carrier requires. Merchant shall pay all costs, charges and expenses incurred in connection therewith, including fines and penalties, and shall indemnify Carrier against any loss or damage to Goods or Containers or other packages or property caused by Merchant's breach of this obligation. Carrier shall have a lien on the Goods for all such costs, charges and expenses. Carrier may, but shall not be obliged to, load, stow, trim, lash, secure, dunnage, tally, count, discharge and take delivery of Goods and Containers or other packages and may employ agents and others for such purposes. Any costs incurred by Carrier shall be for the account of Merchant.

Any delay in loading, discharging or delivery caused by Merchant, or by reason of Goods being unready, or by reason of boycott or other labour difficulty of any kind, or by reason of any cause beyond Carrier's control, may at Carrier's option be treated by Carrier as a breach by Merchant for which Merchant shall be liable for all consequences thereof, including demurrage, and Carrier shall have a lien on the Goods for all such costs, charges and expenses. Carrier may, but shall not be obliged to, load, stow, trim, lash, secure, dunnage, tally, count, discharge and take delivery of Goods and Containers or other packages and may employ agents and others for such purposes. Any costs incurred by Carrier shall be for the account of Merchant.

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(a) If Goods are not taken delivery of by Merchant within the time provided for in Clause 13 hereof, or if Merchant fails to pay Charges, or if Merchant is in breach of any of its obligations hereunder, Carrier may, at its option, and without notice to Merchant, unless required by mandatory law, and without prejudice to any other rights Carrier may have, sell Goods by public or private sale, at any time and in any manner, without notice to Merchant. Carrier may apply proceeds of any sale to Merchant's account, holding any surplus subject to claims against it. Merchant shall remain liable for any deficiency. Carrier shall have a lien on any property of Merchant in its possession for any amount owing to Carrier from Merchant, whether or not relating to the Goods.

17. LIMITATION OF LIABILITY

Except as otherwise provided in this Clause and except as provided under any compulsorily applicable law including if mandatorily applicable, the Australian Carriage of Goods by Sea Act 1991, the Carrier's liability shall be limited to U.S. $500 limited money per package or per customary freight unit unless the nature of the cargo and valuation higher than $500 per package or per customary freight unit shall have been declared by Merchant before shipment and inserted in Bill of Lading, and extra freight paid if required. In such case, if the limitation amount shall exceed declared value, Carrier's liability, if any, shall not exceed declared value.

As to cargo shipped in bulk, the limitation applicable shall be that provided in Section 1304(5) of COGSA, or such other legislation, convention or law as may be applicable to no event shall any liability hereon be construed as a waiver of limitation as to cargo shipped in bulk.

If, on the reverse side hereof, the parties characterize the Container as a package or a lump sum freight is assessed, in either event, liability shall be limited to U.S. $ 500 per Container even if furnished by the Carrier. Notwithstanding the characterization on the reverse side hereof, where a Container is not furnished and/or stuffed by Carrier, each Container shall conclusively be counted a single package and Carrier's liability limited to $500. In the event this provision is held invalid during a period when compulsory legislation shall apply, it shall nevertheless apply during all non-compulsory periods such as, but not limited to, prior to loading and subsequent to discharge from Vessel.

All documents with exception of bona fide bookings shall be issued when Carrier or agent at its principal Agent's office of Carrier in either the country of loading or country of discharge of the Goods.

19. FIRE

Neither the Carrier nor any corporation owned by, subsidiary to or associated or affiliated with Carrier shall be liable in contract for or wholly spent any loss or damage to Goods or Containers or other packages occasioned by any fault, and even though before loading on or after discharge from the Vessel or other Conveyance, by reason of or by means of any law whatsoever, unless Carrier by act, contract damage or neglect, or by act actual fault or privity to any case wherein any exemption is not permitted by law, and no other defences afforded by this Bill of Lading and/or applicable legislation or convention would consecrate Carrier from liability. Carrier shall not be liable for loss or damage by fire unless shown to have been caused by Carrier's negligence.

20. BOTH TO BLAME COLLISION CAUSE

If the Vessel comes into collision with another vessel or object as a result of the fault or negligence of the other vessel or object or any act, neglect or default of the Carrier, Master, crew, pilot, agents or servants of the Carrier in the navigation or in the management of the Vessel, Merchant will indemnify Carrier against all loss or liability to the other or non-carrying vessel or her owners insofar as it represents any loss, damage or claim whatsoever by, of or to the Merchant, paid or payable by the other or non-carrying vessel or her owners to the Merchant and set-off, recouped or recovered by the other or non-carrying vessel or her owners as part of their claim against the carrying Vessel or Carrier.

The foregoing provisions shall also apply where the owners, operators of those in charge of any vessel or vessels or object other than, or in addition to, the colliding vessels or objects are at fault in respect of a collision, contact, stranding or other accident.

This provision to remain in effect in other jurisdictions even if unenforceable or illegal in United States courts.

21. GENERAL AVERAGE

General Average shall be adjusted, stated and settled according to York-Antwerp Rules 1974, as amended, at any place at option of Carrier whether declared by Carrier or any person or vessel (other than the merchants), in the event of accident, danger, damage or disaster, before or after commencement of voyage, from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Carrier is not responsible by statute, contract or otherwise. Merchant shall contribute with Carrier in General Average to payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred. Merchant shall give such cash deposit or other security as Carrier may deem sufficient to cover estimated General Average contribution before delivery of the Carrier requires, or, if Carrier does not so require, within three months of delivery of Goods, whether or not at time of delivery Merchant had notice of Carrier's lien. Carrier shall be under no obligation to exercise any lien for General Average contribution due Merchant. If a salving ship is owned or operated by Carrier, salvage shall be paid for as fully and in same manner as if such salving ship was owned or operated by strangers. Carrier's obligation to General Average shall be paid even when such Average is result of fault, neglect or error of the Master, pilot, officers or crew Merchant expressly renounces any and all duties, defences, liens or responsibilities which might otherwise apply or arise as applicable law pursuant.

22. JURISDICTION

Any suit to enforce any claim for loss or damage in the Goods carried hereunder or to any other breach as referred to in Clause 3, hereof, shall be brought only in the Court by which the Goods are to enjoy the benefit of this Contract. Carrier may, however, at its option and in its sole discretion, elect to bring suit against Merchant in any court of competent jurisdiction at the place of delivery or the port of loading or the port of discharge of the Goods or at any other place designated in this Bill of Lading. Merchant shall submit to the jurisdiction of such court.

In the United States - at New York at S. District Court, Southern District of New York
In Canada - at Montreal in Prov. Province - at Auckland in Australia - at Sydney

Alternatively, if all parties agree, the claim may be referred to arbitration at a place to be agreed upon by the parties.

23. NON-WAIVER AND SEPARABILITY

No failure on the part of Carrier to exercise, and no delay in exercising, any right, power or remedy under this Bill of Lading shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power or remedy preclude any other or further exercise thereof or the exercise of any other right, power or remedy. The rights and remedies provided for in this Bill of Lading are cumulative and not exclusive of any rights or remedies provided by law. If any provision of this Bill of Lading is held invalid or unenforceable by a court of competent jurisdiction, such provision shall be deemed modified to the extent necessary to render it valid and enforceable, or if it cannot be so modified, it shall be deemed deleted from this Bill of Lading, and the validity and enforceability of the remaining provisions of this Bill of Lading shall not be affected thereby.

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No. 02-1028

Supreme Court, U.S.
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2003
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IN THE
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY PTY LIMITED D/B/A KIRBY ENGINEERING AND ALLIANZ AUSTRALIA LIMITED
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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March 21, 2003

HBP

QUESTIONS PRESENTED

1. Did the court of appeals err in construing the terms of a bill of lading contract to determine that an Australian transportation company contracted with an Australian manufacturer as a "carrier," thereby agreeing to assume responsibility for the carriage of the manufacturer's goods, rather than as an "agent," which would have involved agreeing only to conclude a contract of carriage with another carrier on the manufacturer's behalf?

2. Did the court of appeals err in determining that a bill of lading using general language mentioning servants, agents, and independent contractors did not adequately specify a sub-sub-subcontractor railroad with "sufficient clarity," as required by this Court's decision in *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959), to extend the maritime-based defenses of the Carriage of Goods by Sea Act to that inland carrier?

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents James N. Kirby Pty Limited d/b/a Kirby Engineering and Allianz Australia Limited state the following:

James N. Kirby Pty Limited d/b/a Kirby Engineering, an Australian corporation, has no parent company, and no publicly owned company owns 10% or more of its stock.

Allianz Australia Limited, which was known as MMI General Insurance, Ltd. when this litigation began, is a wholly owned subsidiary of Allianz AG, Munich, a German public stock corporation. Allianz AG has no parent company, and the only publicly owned company that owns 10% or more of its stock is Münchener Rückversicherungs-Gesellschaft AG.

For the convenience of the Court when referring to the parties in the case, we will continue to refer to co-respondent Allianz Australia Limited as "MMI General Insurance, Ltd." (or "MMI"), which was the name in use at the time of the relevant transactions.

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INTRODUCTION

This case, brought in diversity to allege state tort-law claims, involves the interpretation of two bills of lading. Petitioner Norfolk Southern asserts that these two contracts limit its liability for the damages caused when its train derailed. International Cargo Control Pty Ltd. ("ICC"), an Australian company that undertakes to transport goods to foreign destinations, issued the first bill of lading to respondent James N. Kirby Pty Limited ("Kirby"), an Australian manufacturer. Hamburg Südamerikanische Dampfschifahrts-Geseilschaft Eggert & Amsinck ("Hamburg Süd"), a German carrier, issued the second bill of lading to ICC.

The Eleventh Circuit rejected Norfolk Southern's contention that it should be the third-party beneficiary of those contracts and thereby limit its own liability. The first contract – the only one to which Kirby was a party – contained no reference limiting the liability of inland carriers, and the court held that it lacked the specific indicia required to extend the limitations of liability to a sub-sub-subcontractor, which was Norfolk Southern's relationship to ICC. The second bill of lading was irrelevant because Kirby was not a party to that contract and ICC had not acted as Kirby's agent in dealing with Hamburg Süd. The court's conclusions involved only matters of contract interpretation; the court did not construe any federal statute or decide any question of federal law. The court below followed this Court's decision in *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959), and explained why its decision was not in conflict with the decision of any other court given the particular facts.

Notwithstanding the extraordinarily fact-based issues presented, Norfolk Southern contends that this case raises not one but two issues under the Carriage of Goods by Sea Act ("COGSA") on which this Court's further review is "imperative." Pet. 29. That contention is remarkable. In the 67-year history of the statute, this Court has only three times decided issues raised by the statute, and

this case does not even concern an issue of COGSA construction. Petitioner's contention is all the more remarkable because (contrary to the impression that the petition strives to create) COGSA was intended to regulate *vessel* carriers, not railroads; the result that Norfolk Southern seeks can be obtained by better contractual arrangements between the commercial parties; and an ongoing international diplomatic process is already addressing the two issues that Norfolk Southern raises before this Court.

STATEMENT

1. This case concerns a multimodal, multiparty operation to transport equipment from Australia to the United States. One key role in this transaction was played by a "freight forwarder," a term that in international transactions can be used for an entity that, in varying circumstances, plays many roles and different roles at different times. *See generally* HUGH M. KINDRED & MARY R. BROOKS, MULTIMODAL TRANSPORT RULES 13-15 (1997); PAUL M. BUGDEN, FREIGHT FORWARDING AND GOODS IN TRANSIT 1-7 (1999).[1] A proper understanding of the fact-specific and multi-faceted roles of a freight forwarder is important for the Court's understanding of this case and the context in which the court below rendered judgment.

Historically, freight forwarders acted as agents, usually on behalf of a cargo owner but sometimes on behalf of an ocean carrier. As an agent, a forwarder would typically arrange a contract of carriage between its customer, the

[1] Even the term "freight forwarder" creates confusion, as the entities that perform the various roles of the freight forwarder can be called different names. *See, e.g.*, KINDRED & BROOKS, *supra*, at 11-16 (referring to freight forwarders as "third party logistical service providers" or "TPLs"); *id.* (referring to "non-vessel-operating carriers" or "NVOCs"); 46 U.S.C. app. § 1702(17)(B) (referring to "non-vessel-operating common carrier" or "NVOCC"); BUGDEN, *supra*, at 63-64; PETER JONES, FIATA LEGAL HANDBOOK ON FORWARDING 70-71 (2d ed. 1993). Indeed, the industry's trade group in the United States is named the "Transportation Intermediaries Association," *see* www.tianet.org, with the term "transportation intermediary" also being a term used by Congress. *See* 46 U.S.C. app. § 1702(17).

cargo owner, and an ocean carrier. The ocean carrier would issue its bill of lading to the cargo owner, who would be named as "shipper" on the bill of lading. The cargo owner would be responsible for paying the ocean carrier's freight charges (although the forwarder might assume secondary liability). The forwarder was responsible for the careful performance of its agency functions, but did not assume the carrier's liability for the safe delivery of the cargo.[2]

Beginning in the late 1960s and early 1970s in Europe, and in the early 1980s in North America, forwarders expanded their services and themselves assumed a carrier's responsibility for the delivery of the cargo. *See, e.g.*, KINDRED & BROOKS, *supra*, at 12-13. At times they still acted as agents for cargo owners, but increasingly they acted as a principal when entering into a contract of carriage with a cargo owner. As principal, a forwarder issues its own bill of lading to the cargo owner, who is named as "shipper." The forwarder then subcontracts some or all of the responsibilities for carriage. Most significantly, it typically subcontracts with an ocean carrier for the transportation of the goods by sea. The ocean carrier issues its bill of lading to the forwarder, who is named as "shipper" on this second bill of lading. The cargo owner pays the forwarder's freight, while the forwarder pays the ocean carrier's freight. *See generally* RAMBERG, *supra*, at 18-29; BUGDEN, *supra*, at 48-49. The role that the forwarder plays varies from case to case and requires a careful analysis of the particular contracts involved in the transaction.

In recognition of the changing needs of the transportation industry (including the developments discussed here), the United Nations Commission on International Trade

[2] *See generally* JAN RAMBERG, THE LAW OF FREIGHT FORWARDING AND THE 1992 FIATA MULTIMODAL TRANSPORT BILL OF LADING 13-14 (1993); KINDRED & BROOKS, *supra*, at 12-15; BUGDEN, *supra*, at 1-7; JONES, *supra*, at 21-22; GERALD H. ULLMAN, THE OCEAN FREIGHT FORWARDER, THE EXPORTER AND THE LAW 5 (1967).

Law ("UNCITRAL") is currently working to update the international convention on which COGSA is based, *see, e.g.*, UNCITRAL, *Report of Working Group III (Transport Law), Tenth Session*, U.N. doc. no. A/CN.9/525 (Oct. 7, 2002), and the United States is an active participant in these negotiations, *see id.* ¶ 18; UNCITRAL, *Report of Working Group III (Transport Law), Ninth Session*, U.N. doc. no. A/CN.9/510, ¶ 15 (May 7, 2002).[3] This project began almost five years ago, *see* Stuart Beare, *Liability Regimes: Where We Are, How We Got There and Where We Are Going*, 2002 LLOYD'S MAR. & COM. L.Q. 306, 306, and it involves not only governments and intergovernmental organizations interested in trade, but also specialized organizations representing the affected commercial parties, *see, e.g., id.*; UNCITRAL, *Report of Working Group III (Transport Law), Tenth Session, supra*, ¶ 20(c); UNCITRAL, *Compilation of Replies to a Questionnaire*, U.N. doc. no. A/CN.9/WG.III/WP.28, at 3-11, 32-43 (Jan. 31, 2003). The Association of American Railroads ("AAR"), of which petitioner is a prominent member, is a participant in the project. *See, e.g., id.* at 32-34.

2. The transaction here concerns ten containers of machinery that Kirby sold to General Motors for use at its factory in Huntsville, Alabama. Kirby contracted with ICC, an Australian freight forwarder, which issued its own bill of lading to Kirby in which it designated itself as the carrier of the goods. Clause 8.6(b) limited the issuer's liability to $500 per package when COGSA is compulsorily applicable. *See* Pet. App. 67a. Clause 10.1, a Himalaya clause (*see id.* at 2a & n.1), extended the issuer's defenses to other beneficiaries by providing, in pertinent part (*id.* at 67a):

> These conditions apply whenever claims relating to the performance of the contract evidenced by this FBL [*i.e.*, this bill of lading] are made against any

[3] The U.N. documents cited in this brief are available on the UNCITRAL website at www.uncitral.org.

> servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract, whether such claims are founded in contract or in tort . . . .

ICC, in turn, arranged with Hamburg Süd to carry the goods from Sydney to Huntsville. Hamburg Süd issued a bill of lading to ICC, in which Hamburg Süd designated itself as the carrier and ICC as the shipper. This bill of lading also contained a limitation clause and a Himalaya clause.

Hamburg Süd carried the cargo itself on the ocean voyage from Sydney to Savannah, Georgia, and then subcontracted with Columbus Line USA, Inc., a separately incorporated subsidiary of Hamburg Süd, to deliver the cargo from Savannah to Huntsville. Columbus Line USA, in turn, subcontracted with Norfolk Southern to perform the Savannah-to-Huntsville inland carriage. During that final leg, the Norfolk Southern train (operated by a Norfolk Southern crew on a Norfolk Southern track) derailed. Kirby's cargo suffered more than $1.5 million in damages.

3. Kirby and MMI General Insurance, Ltd. ("MMI")[4] filed this diversity suit to recover damages for the derailment. Norfolk Southern denied liability, but in a motion for partial summary judgment argued that its liability (if any) was limited to $5,000. That motion was based on the limitation and Himalaya clauses in the bills of lading. The district court granted Norfolk Southern's motion.[5]

[4] For the convenience of the Court when referring to the parties in the case, we will continue to refer to respondent Allianz Australia Limited as "MMI General Insurance, Ltd." (or "MMI"), which was the name in use at the time of the relevant transactions.

[5] As the court of appeals noted, the procedural history was more complicated, but ultimately not relevant to the issues raised by Norfolk Southern in its petition for a writ of certiorari. That procedural history is detailed in the briefs below. *See* Kirby C.A. Br. 4-5.

4. In an interlocutory appeal, the court of appeals reversed. The court's analysis proceeded in two steps: first, deciding whether Kirby was bound by the Hamburg Süd bill of lading when Kirby was not a party to it; and, second, assessing whether the ICC bill of lading was sufficiently clear to extend the benefits of the limitation clause to a sub-sub-subcontractor and inland carrier like Norfolk Southern.

a. The court determined that Kirby was not bound by the terms of the Hamburg Süd bill of lading because Kirby was not a party to that contract: "ICC, not Kirby, hired Hamburg Sud, and ICC, not Kirby, is named on the [Hamburg Süd] bill as the shipper of the goods, which means that Kirby did not itself agree to the terms of the bill." Pet. App. 6a. The "pivotal question," therefore, was whether ICC "had authority to and did bind Kirby to the terms of the bill, including its package limitation and its Himalaya clause." *Id.* at 6a-7a. After a detailed factual analysis of the relevant contracts in the transaction, the court determined that ICC was not acting as Kirby's agent at the time it contracted with Hamburg Süd. *Id.* at 7a.

A number of factors pointed to this conclusion. First, the "structure of the transaction" revealed that the parties were contracting as principals. *Id.* Second, the ICC bill of lading "expressly states that ICC was undertaking 'to *perform* . . . the entire transport,' or '*in [its] own name* to procure the performance of the entire transport.'" *Id.* at 8a (quoting ICC bill of lading) (alterations and emphasis in original). The court concluded that the "plain language" of that bill "clearly intended" that ICC "would act as a principal in any subsequent contracts it entered into for the transport of the machinery" and would "assume[] responsibility 'for the acts or omissions of its servants or agents,'" language the court observed would not be necessary if ICC were acting as Kirby's agent. *Id.*

Third, the court concluded that the "form of the ICC bill also shows [that] ICC was a principal, not Kirby's agent."

Id. Commentary from the drafters of the "FBL" (the standard form that ICC used) "indicates that, when the FBL form is used, the freight forwarder assumes the role of carrier and therefore becomes a principal." *Id.* (citing RAMBERG, *supra*, at 7). Fourth, the court held that key provisions in the Hamburg Süd bill of lading "reinforce[d] the conclusion that ICC was acting as principal, and not as Kirby's agent." *Id.* at 9a. Finally, the court noted that its conclusion was consistent with circuit precedent that "a freight forwarder should not automatically be taken to be the agent of the party who hires it to facilitate the shipment of goods." *Id.*

The court rejected Norfolk Southern's argument that, notwithstanding all of those contrary indications, ICC "must have been Kirby's agent" by operation of a federal statute that requires a Federal Maritime Commission ("FMC") license for an ocean transportation intermediary. *Id.* at 10a n.9. In making that argument, Norfolk Southern had invoked a licensing requirement that "was not in force at the time" the bills of lading were issued; the provision did not apply by its plain terms to ICC as "an Australian company doing business in Australia"; Norfolk Southern had not met its burden of showing that ICC was unlicensed; and, finally, Norfolk Southern had not established that, even if ICC had failed to obtain a license, its failure "would work to Kirby's detriment by rendering Kirby bound to the terms of a contract entered into by a party it had never made its agent." *Id.* at 10a-11a n.9.

b. Having explained why Kirby could not be bound by the Hamburg Süd bill of lading, the court then addressed whether Norfolk Southern was entitled to the limitation of liability defenses contained in the ICC bill of lading. The court explained that this Court's decision in *Herd* required that a clause purporting to limit the liability of parties hired by the carrier had to be drafted "with sufficient clarity to specifically identify those parties." *Id.* at 11a. In reviewing the two bills of lading, the court below noted this Court's admonition that "'contracts purporting

to grant . . . limitation of liability must be strictly construed and limited to their intended beneficiaries.'" *Id.* (quoting *Herd*, 359 U.S. at 305) (ellipsis in original). The court then explained that, following *Herd*, the Eleventh Circuit's prior cases had imposed a "clarity of language" requirement to ensure that the contract "is drafted with 'language expressing a clear intent to extend the benefits to a well-defined class of readily identifiable persons,'" and to allow that clause to be enforced "only by members of that well-defined class." *Id.* at 12a (quoting *Hale Container Line, Inc. v. Houston Sea Packing Co.*, 137 F.3d 1455, 1465 (CA11 1998)).

In applying those principles to the ICC bill of lading, the court below concluded that the phrase "other person" was too vague to satisfy the clarity of language requirement, so the question was whether Norfolk Southern was covered by the words "servant, agent, or . . . independent contractors." *Id.* With its focus on "independent contractors," the court explained that, when a subcontractor had been directly engaged by a carrier, such as a "stevedore" or "terminal operator," it was not necessary for the contract to enumerate specific categories of agents or independent contractors. *Id.* at 12a-13a (collecting cases). But when, as here, ICC had not engaged Norfolk Southern, the railroad could not rely on the Eleventh Circuit's "clarity of language" cases. "If Kirby and ICC had intended for the protections of the ICC bill to extend to sub-sub-contractors, they could have said so." *Id.* at 13a.

The court "recognize[d] that the Ninth Circuit has arguably taken a different view." *Id.* (citing *Akiyama Corp. of Am. v. M.V. Hanjin Marseilles*, 162 F.3d 571, 574 (CA9 1998)). The court then explained why it did not perceive a conflict with the Ninth Circuit. First, it noted that in *Akiyama* the terms being invoked were "descriptive," such as "stevedore" and "terminal operator," and not "relational." *Id.* at 14a n.11. As the court explained, the "result, though not the language, of *Akiyama* conforms to

this rule." *Id.*[6] Second, the court held that cases extending the limitation of liability to inland carriers "seem to support the principle that a special degree of linguistic specificity is required." *Id.* at 15a-16a. The court explained this "linguistic specificity" principle in light of how the cases extending Himalaya clauses had been decided, with the extensions being afforded to workers such as stevedores, terminal operators, and similar parties "whose work is done at or close to the point where the cargo is unloaded from the ship." *Id.* at 16a.

The "caution" the court felt obliged to exercise was not obviated by the fact that the bills of lading here were "through bills," meaning they had "provided for transport to an inland destination rather than merely to the port of discharge." *Id.* The drafters of the FBL form had based their model bill of lading on a "network" approach in which "each leg of a journey should be subject to the liability rules governing the mode of transport for that leg." *Id.* at 17a. Because rail carriage has its own liability regime, the court reasoned that the Himalaya clause protections were intended to apply only to "parties who are, so to speak, between liability regimes, at the fringes of the sea regime – stevedores, terminal operators, and the like." *Id.* Accordingly, "if the Himalaya clause is to extend inland, it must say so with specificity, as, for example, did the Himalaya Clause in the Hamburg Sud bill when it clearly identified as among its beneficiaries 'all participating (*including inland*) carriers.'" *Id.* (emphasis in original). Such a specificity requirement, in the court's view, better comported with "*Herd*'s principle that liability limi-

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[6] The court below also noted that the *dicta* in *Akiyama* stating that a party seeking to invoke the Himalaya clause "need not be in privity with the carrier" is implicitly contradicted by an earlier Ninth Circuit case, *Mori Seiki USA, Inc. v. M.V. Alligator Triumph*, 990 F.2d 444, 450-51 (1993). Pet. App. 14a-15a n.11.

tations in bills of lading must be narrowly construed." *Id.* at 18a.[7]

c. The court denied Norfolk Southern's petition for rehearing en banc without calling for a response and without dissent. *Id.* at 39a-40a.

REASONS FOR DENYING THE PETITION

I. Norfolk Southern's first question presented ignores that the particular facts and circumstances determine whether a freight forwarder acts as the cargo owner's agent (and thereby binds the cargo owner to subsequent contracts) or acts as the principal (and thereby assumes the responsibilities and liabilities for the carriage of goods and does *not* bind the cargo owner to its subcontracts). The court below relied on numerous facts to hold that ICC was not Kirby's agent but instead assumed responsibility (and liability) for any loss in the bill of lading with Hamburg Süd. Even the dissenting judge recognized that this issue is fact-bound. The judges' disagreement over how to construe the relevant contracts is not an issue of general importance warranting this Court's review. Even if this Court were interested in any wider issues, this case would provide a poor vehicle for resolving them.

II. There is no conflict between the Eleventh and Ninth Circuits on the second question presented. As the court below explained, the Ninth Circuit's holdings are consistent with the Eleventh Circuit's announced rule. In any event, Norfolk Southern ignores the court's alternative holding that a "special degree of linguistic specificity" is necessary before a maritime-based limitation of liability clause may be extended to inland carriers. *See* Pet. App. 16a. That holding provides an independent basis for affirmance as well as another explanation for why the decision below does not conflict with any Ninth Circuit decision. Even if a conflict were to arise, this Court would not need to resolve it, and this case would in any event provide a poor vehicle for doing so.

[7] Judge Siler, visiting from the Sixth Circuit, dissented. He believed that ICC was acting as Kirby's agent, and not as a principal, although he recognized that a freight forwarder can be a principal in certain circumstances. Pet. App. 19a. Accordingly, in his view, Kirby was bound by ICC's contract with Hamburg Süd.

I. Whether ICC was Kirby's agent is a fact-bound question that raises no issue of general importance warranting this Court's review

A. The case does not raise the question presented in the petition

In an effort to make a fact-bound decision appear to be of general importance, Norfolk Southern has framed the first question presented so as to have virtually no relation to the court of appeals' decision. As we explain, and as even the dissent below acknowledged, a freight forwarder can take on different roles, including that of a principal with responsibility for undertaking the carriage of the goods. *Cf.* p.3, *supra*; Pet. App. 19a (noting that "a freight forwarder can be a principal"). In framing the question as it has,[8] Norfolk Southern appears to be asking for a general rule wholly divorced from the parties' intentions, the actual language in the contracts they ratify, and the practices that govern the industry. The true question raised in this case is whether the court of appeals properly construed the relevant contracts to hold that ICC was not acting as Kirby's agent when it contracted with Hamburg Süd. Even the authorities on which petitioner relies to explain the FBL acknowledge that a fact-specific analysis is required. *See, e.g.*, RAMBERG, *supra*, at 7 (noting that the freight forwarder "shifts colour to fit into the legal environment of his varying services" but when it uses the FBL "the freight forwarder progresses from the legal jungle and clearly establishes himself as a carrier with carrier liability").

[8] Pet. i ("Whether a cargo owner that contracts with a freight-forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with carriers to provide that transportation.").

Thus, if this Court were to grant review of the first question as posed in the petition, the only reasonable answer would be, "It depends on the facts of each case." As we explain, and as the court below stressed, there is nothing talismanic about ICC's calling itself a "freight forwarder." Whether in any given case a freight forwarder may be treated as a principal or as the cargo owner's agent will depend on the facts.

In this case, the court below undertook a careful and thoughtful analysis of the relevant contracts and concluded that on these facts ICC was not Kirby's agent. Now that Norfolk Southern has finally[9] admitted that ICC acted as a carrier, *i.e.*, as a principal, in its dealings with Kirby, *see, e.g.*, Pet. 2, 14-15 n.4, 16, 21, it is completely illogical for Norfolk Southern also to contend that ICC was also Kirby's agent. An entity cannot be a principal and an agent with respect to the same duties owed to the same party at the same time. *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 1.01 (Tent. Draft No. 2, 2001) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests or otherwise consents so to act."). Unhappy with the result obtained, Norfolk Southern twists the facts in an effort to avoid this conclusion,[10] but no amount

[9] In the court of appeals, Norfolk Southern argued that ICC could not be a carrier – the exact opposite of its current position. *See* pp. 6-7, *supra*; pp. 22-23, *infra*.

[10] For example, Norfolk Southern quotes the ICC bill of lading for the proposition that ICC "may engage other carriers to perform the contract" (Pet. 6), but its quotation ellipses out the crucial words "in its own name." Thus, as the court below held, ICC "was undertaking 'to *perform* . . . the entire transport,' or '*in [its] own name* to procure the performance of the entire transport.'" Pet. App. 8a (alterations and emphasis in original). The court emphasized the "in its own name" language because that phrase demonstrated the intent that ICC "would act as a principal in any subsequent contracts it entered into for the transport of the machinery." *Id.*

of selective distortion of the contracts will change the fact that the parties intended that ICC would not act as Kirby's agent when it contracted with Hamburg Süd.

B. This Court's review of this issue is unnecessary

1. It is well settled that a party generally cannot be bound by a contract to which it is not a party. *See generally* E. ALLAN FARNSWORTH, CONTRACTS § 3.1, at 110 (3d ed. 1999). Indeed, that proposition is so well settled that Norfolk Southern does not question it, directing its fire instead at the proposition that ICC was Kirby's *de facto* agent. Pet. 18 (arguing that the court should follow the "commercial norm"). But, as the court properly recognized, "ICC's status as a freight forwarder is not itself dispositive of the question, because freight forwarders 'may act as agents or as principals, depending on the facts.'" Pet. App. 7a (quoting Stephen G. Wood, *Multimodal Transportation: An American Perspective on Carrier Liability and Bill of Lading Issues*, 46 AM. J. COMP. L. 403, 413 (1998)). *See also id.* at 19a ("a freight forwarder can be a principal").

In applying that principle to the facts presented, the court below engaged in a highly nuanced factual analysis of the contracts, the parties' intent, and the structure of the transaction. It concluded that ICC and Kirby evidenced the requisite intent to establish by contract that ICC was to be the carrier as a principal and not to perform its duties as Kirby's agent. That decision is simply a fact-bound – and correct – application of settled law.

2. Norfolk Southern offers a plethora of cases supposedly in conflict with the Eleventh Circuit's judgment (Pet. 14-19), but the decision below does not conflict with the decisions of this or any other court.

a. Petitioner's assertion (Pet. 19) that the decision below is "in square conflict with" *The Lexington* (*New Jersey Steam Navigation Co. v. Merchant's Bank*, 47 U.S. (6 How.) 344 (1848)), is inexplicable. In *The Lexington*, the cargo owner recovered full damages from a negligent

party that was at least arguably a subcontractor. To the extent that the two cases are comparable, this is precisely the same result reached by the court below. Petitioner is simply wrong to say that the *Lexington* Court "went on to hold that the contractual limitation of the vessel owner's liability was binding on the cargo owners." Pet. 20. In fact, the Court held that the vessel owner's contractual limitation was *not* binding on the cargo owners, and it affirmed the lower court's award of full damages. 47 U.S. at 437. As the plurality[11] opinion declared, "the respondents [the vessel owners] are liable for the loss of the specie, notwithstanding the special agreement under which it was shipped." *Id.* at 385.

Even the *Lexington* plurality's *dicta* on which petitioner relies (Pet. 19-20) are readily distinguishable. Those statements arose in the context of deciding whether the cargo owner could sue the performing carrier on the relevant contract, not whether the cargo owner was bound by the contract.[12] As *The Lexington* was decided more than a decade before *Lawrence v. Fox*, 20 N.Y. 268 (1859), the seminal U.S. decision on third-party-beneficiary contracts, those statements are best seen as an early attempt to deal with third-party-beneficiary problems.[13]

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[11] In a 4-2-2 decision, the plurality opinion was by Justice Nelson, joined by Chief Justice Taney, Justice McLean, and Justice Wayne. 47 U.S. at 378-92. Justice McKinley did not participate. *Id.* at iii. Justice Catron, *id.* at 393-95, and Justice Woodbury, *id.* at 418-37, each concurred in the judgment. Justice Daniel, joined by Justice Grier, dissented. *Id.* at 395-418. Justice Grier's vote is noted in the Court's Minutes for March 7, 1848, at p. 5764, and in the LEXIS report of the case.

[12] The most relevant authority cited by the plurality (47 U.S. at 381), *Sanderson v. Lamberton*, 6 Binney 129 (Pa. 1813), also arose in that context, *see id.* at 131-32, which helps clarify the focus of the plurality's discussion.

[13] Even within the correct context, the *dicta* are not so straightforward as they appear when quoted out of context. The plurality's analysis still turned on the facts. For example, Justice Nelson specifically noted that the result would have been different if the contract had been under seal. 47 U.S. at 380. In the ordinary course of events, the *Lexington* contract would have been under seal. The parties' original contract had been under seal, *see id.* at 344-45, but they were then operating under an unsealed renewal, *see id.* at 346, pending a formal renewal that had been delayed due to bad weather, *see id.* at 365. Of course the law has developed considerably since the era when it mattered whether a contract was under seal. *See generally* E. ALLAN FARNSWORTH, CONTRACTS § 2.16, at 86-87 (3d ed. 1999). The important point is that the relevant contracts must be construed in light of the facts and the prevailing law. There is no general law that a freight forwarder is always the cargo owner's agent. *See* p. 3, *supra*. To the extent that this is ultimately Norfolk Southern's position, *The Lexington* provides no support.

Other decisions of this Court on which petitioner relies are also irrelevant. *Chicago, Milwaukee, St. Paul & Pacific Railroad v. Acme Fast Freight, Inc.*, 336 U.S. 465 (1949), involved a dispute between a freight forwarder and a performing carrier. The cargo owner was not involved. In *Great Northern Railway Co. v. O'Connor*, 232 U.S. 508 (1914), there is no suggestion that the freight forwarder assumed a carrier's obligations to the cargo owner (as ICC did in this case). Indeed, the court below cited *O'Connor* and implicitly distinguished it on that basis. Pet. App. 6a-7a. Even the language quoted in the petition (at 20) (noting the *O'Connor* plaintiff's remedy against the freight forwarder) demonstrates that the *O'Connor* Court viewed the freight forwarder simply as an agent and not as a carrier, for the remedies against a carrier would have been very different.

b. Nor does the decision below present a conflict with decisions in other circuits. In none of the cases cited by petitioner does a court of appeals conclude that a freight forwarder, on similar facts or a similarly worded bill of lading, must be viewed as a cargo owner's agent. Instead, petitioner offers up a hodge-podge of cases, most of which have nothing to do with the dispute the parties litigated and the court below decided.

In *Kukje Hwajae Insurance Co. v. M/V Hyundai Liberty*, 294 F.3d 1171 (CA9 2002), *cert. pending sub nom. Green Fire & Marine Ins. Co. v. M/V Hyundai Liberty*,

No. 02-813 (filed Nov. 22, 2002), the Ninth Circuit concluded that a non-vessel-operating common carrier ("NVOCC") had acted as a cargo owner's agent when contracting with a vessel carrier. Although *Kukje Hwajae* is an aberrational decision,[14] for it is inconsistent with the plain language of the Shipping Act's definition of an NVOCC, 46 U.S.C. app. § 1702(17)(B), it still does not conflict with the decision below.

First, the Ninth Circuit's decision turns primarily on the intermediary's NVOCC status. By contrast, it is unclear whether ICC was an NVOCC and the courts below never ruled on that issue. In the Eleventh Circuit, respondent expressed no view on the issue and petitioner argued vigorously that ICC could not have been an NVOCC. *See* pp. 22-23, *infra*. Although petitioner now argues that ICC *was* an NVOCC, *see id.* at 22, the parties never litigated that issue and thus the record is inadequate to support any conclusion, *see id.* at 22-23.

In addition, the Ninth Circuit – in sharp contrast with the court below – never analyzed the relevant factors that would have enabled it to make a reasoned finding that the NVOCC was the cargo owner's agent. Because the Ninth Circuit raised this theory *sua sponte* during oral argument, it reached its conclusion without the benefit of any

[14] The primary basis for the Ninth Circuit's decision was a stray sentence in an academic article that was taken out of context. *See* 294 F.3d at 1176 (quoting Martin Davies, *In Defense of Unpopular Virtues: Personification and Ratification*, 75 TUL. L. REV. 337, 395-96 (2000)). The real point of Prof. Davies's statement was that an NVOCC does not act as the ocean carrier's agent when it issues its own bill of lading, and thus the vessel in an *in rem* action should be deemed to ratify the vessel owner's bill of lading rather than the NVOCC's. Ironically, if the Ninth Circuit had followed Prof. Davies's actual argument instead of taking a careless sentence out of context, it would have reached the same conclusion – on the same grounds as the Second Circuit did in *Insurance Co. of N. Am. v. S/S American Argosy*, 732 F.2d 299 (CA2 1984) (discussed at p. 18, *infra*), on which the Ninth Circuit also relied. This alternative rationale for the Ninth Circuit's result in *Kukje Hwajae* provides another basis for distinguishing the case.

briefing, *see Green Fire* Pet. 8-9, or the development of an adequate record to address the issue.

In short, the record developed below is inadequate for an appellate court to resolve the principal question on which the Ninth Circuit decided *Kukje Hwajae* (the NVOCC status of the freight forwarder), and the record in that case is inadequate for an appellate court to resolve the principal question on which the Eleventh Circuit decided this issue (whether the freight forwarder was a principal or the cargo owner's agent). There is thus no firm basis for concluding that the cases conflict.

The *Kukje Hwajae* case also arose in a very different context from the one presented here. The defendant there was seeking to enforce the forum selection clause in its own bill of lading. As this Court has made clear, enforcement of such clauses is favored. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537-39 (1995). Petitioner, in contrast, claims the benefit of a Himalaya clause in *another* carrier's bill of lading. This Court has equally made clear that such efforts are to be "strictly construed and limited to intended beneficiaries." *Herd*, 359 U.S. at 305.

The other circuit court decisions that petitioner cites are at best only marginally relevant and none even comes close to constituting a square conflict. One, for example, involved different types of parties and different actions that bear no resemblance to this case. *See Morrow Crane Co. v. Affiliated FM Ins. Co.*, 885 F.2d 612, 613 (CA9 1989) (not a cargo damage case but an action between a cargo owner and its insurer in which the owner's "independent freight forwarding agent" acted simply as an agent to arrange shipment on the owner's behalf).

In other cases cited by petitioner, no freight forwarder or intermediate carrier was even involved, so there is no basis at all for asserting a conflict. *See, e.g., Carmen Tool & Abrasives, Inc. v. Evergreen Lines*, 871 F.2d 897 (CA9 1989) (rejecting consignee's claim that it was not bound by the actions of the shipper from which it derived its rights);

Puerto Rico Maritime Shipping Auth. v. Crowley Towing & Transp. Co., 747 F.2d 803 (CA1 1984) (without considering any argument that the cargo owner was bound by the carrier's bill of lading, holding that the carrier was not at fault under the Puerto Rico Civil Code when a lessee shipped the owner's property without permission). Not only did *Stolt Tank Containers, Inc. v. Evergreen Marine Corp.*, 962 F.2d 276 (CA2 1992), involve no freight forwarder or intermediate carrier, but the defendant vessel carrier's entitlement to limitation turned on the mandatory application of COGSA because the damage there (unlike the derailment here) occurred at sea, *see id.* at 279.

Finally, the cases involving NVOCCs are inapposite. *See SPM Corp. v. M/V Ming Moon*, 22 F.3d 523 (CA3 1994)[15] (indemnity dispute between an NVOCC and two co-defendants; references cited by petitioner (at 17) were not dispositive of court's conclusion but instead described the Eleventh Circuit's reasoning in another case); *Insurance Co. of N. Am. v. S/S American Argosy*, 732 F.2d 299 (CA2 1984) (characterization of the NVOCC's role was irrelevant to the case's outcome; court held that the vessel in the *in rem* action had not ratified the NVOCC's bill of lading because the vessel owner had issued its own bill of lading).

3. Even if a square conflict on the agency issue were to arise some day, petitioner offers no reason why this Court should resolve it. The purported reasons given for the "importance" of the issue – defeating "settled expectations" (*e.g.*, Pet. 2, 14, 21), and protecting "reliance interests" (*e.g.*, Pet. 3) – are unfounded and have no merit.

a. The decision below does not defeat settled expectations. The petition leaves the impression that Norfolk Southern expected to perform its contract with Columbus

[15] Petitioner also cites (at 18) an earlier aspect of this litigation. In *SPM Corp. v. M/V Ming Moon*, 965 F.2d 1297, 1305 n.9 (CA3 1992), the Third Circuit described an NVOCC as the shipper's agent. There was no indication or discussion of the factual context, and there was no suggestion that the parties contested the issue.

Line USA on the same terms as ICC and Hamburg Süd performed their contracts, and that its lack of privity with Kirby, ICC, and Hamburg Süd was a technicality that should be ignored in the interests of commercial convenience. The truth is remarkably different. Norfolk Southern's actual expectation at the time of the transaction was to rely on its own privity of contract argument to protect itself from the legal consequences of its negligence.

When Kirby filed its original claim with Norfolk Southern, the railroad replied on May 20, 1998, and June 9, 1998. Both letters stated:

> Under Norfolk Southern's Circular No. 1-A, which governed this shipment, Rule 16, Article B, Paragraph 4, Subparagraph (h) states that Norfolk Southern shall not be liable for loss damage or delay to lading to any party other than the Rail Services Buyer [defined under Rule 3, Paragraphs 16-18, as the "Contracting Party"]. [Norfolk Southern] will not be under any obligation to process any claim by any person other than the Rail Services Buyer.
>
> In this case, the rail services buyer is Columbus Line USA Inc. . . . In light of the [*sic*] this, your claim as submitted is respectfully declined.[16]

See Kirby Br. in Opp. to Mot. for Partial Summ. J., Exhs. 6-7 (N.D. Ga. filed Apr. 13, 2000); *see also* Kirby C.A. Reply Br. 24-25. Norfolk Southern's initial defense, there-

[16] Although this argument seems remarkable, harkening back to the era before *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) (holding a negligent party liable for the injuries that it caused despite the injured party's lack of privity), it is in fact the position that the U.S. railroad industry regularly asserts. *See, e.g.*, Comments on Behalf of the Association of American Railroads [filed with the Maritime Administration, Dep't of Transportation], docket no. MARAD-2001-11135-12 (filed Sept. 13, 2002) (describing AAR members' reliance on this privity of contract argument); UNCITRAL, *Compilation of Replies to a Questionnaire*, U.N. doc. no. A/CN.9/WG.III/WP.28, at 32-34 (Jan. 31, 2003) (substantially identical comments filed with UNCITRAL). The AAR's arguments in this case, *see* AAR Amicus Br. 13-15, contrast sharply with its comments to MARAD and UNCITRAL.

fore, was that only Columbus Line USA could recover against the railroad because it was the only party in privity of contract with Norfolk Southern. Only when it became obvious that its privity of contract argument would be ineffective to defeat Kirby's tort claim (because Kirby was not a party to any contract governed by the Norfolk Southern circular) did petitioner change direction completely and settle on the new "expectation" that it now presents to this Court.

Nor does the decision below defeat the expectations of those who drafted the ICC bill of lading, which is the relevant contract in this action. As explained above, *see* p. 6, *supra*, and as recognized both by the court of appeals, Pet. App. 8a-9a, and by one of petitioner's principal authorites on the FBL, the primary purpose of the International Federation of Freight Forwarders Associations ("FIATA") in promulgating the FBL form was to provide a mechanism for a freight forwarder to become a "principal in the contract" rather than merely "an agent and intermediary," RAMBERG, *supra*, at 7. Petitioner, not the Eleventh Circuit, would defeat that settled expectation.

Finally, the record does not contain specific evidence of respondents' expectations at the time of the transaction, but they may be presumed to have had the expectations of most commercial parties in their positions. Kirby presumably intended to be bound by contracts to which it was a party, and not to be bound by contracts to which it was not a party. That is the very essence of freedom of contract, which most commercial parties seek. MMI presumably set its premium based on the assumption that it would have subrogation rights against those who caused any damage to the insured goods, and that a U.S. tortfeasor's liability would be limited only to the extent permitted by *Herd*.[17]

[17] Accordingly, there is no merit to petitioner's complaint that MMI receives a "windfall" from the decision below. Pet. 3. In fact, Norfolk Southern seeks a windfall. Having damaged the cargo and found its own (higher) limitation of liability under its circular to be untenable,

b. If Norfolk Southern had actually had the expectations that it now asserts, the commercial parties could have protected them by contract. It is important to keep sight of the fact that this is simply a contract interpretation case. Nothing that the court below did (or that this Court might do) will interfere with the ability of commercial parties to structure future transactions as they wish simply by entering into contracts that provide for the rights and obligations that they agree to accept. No court required ICC to issue a bill of lading on the FBL form. Future freight forwarders may use a different form if they object to the decision below. If FIATA wishes to revise its views in light of the Eleventh Circuit's treatment of the FBL, it may revise the form. If Norfolk Southern is unhappy with the terms in its customers' contracts, it can decline to participate in multimodal transactions, insist on its own contract with the cargo owner, or seek indemnity agreements in its own contracts with vessel carriers. *See, e.g., Nippon Yusen Kaisha v. International Import & Export Co.*, [1978] 1 Lloyd's Rep. 206 (Q.B. (Com. Ct.) 1977) (giving effect to a circular indemnity clause). This Court need not intervene to protect commercial parties from their failure to conclude the contracts that, in retrospect, they wish they had entered.

4. This Court's review of the decision below is also unnecessary because the ongoing diplomatic efforts at UNCITRAL, *see* pp. 3-4, *supra*, are addressing proposals that would bear directly on the need for the type of agency analysis conducted by the court below. In particular, the extent to which the new convention should regulate parties lacking privity of contract is one of the primary issues before UNCITRAL. Recognizing the growing importance of non-vessel-operating carriers (NVOCs), for example, article 1.1 of the current Draft Instrument defines a carrier not as COGSA § 1(a) does (by reference to the vessel owner or charterer) but as *any* "person that enters into a

petitioner invokes a limitation of liability in another carrier's contract to which it is not a party or a specifically designated beneficiary.

contract of carriage with a shipper." UNCITRAL, *Preliminary Draft Instrument on the Carriage of Goods by Sea*, U.N. doc. no. A/CN.9/WG.III/WP.21, at 9 (Jan. 8, 2002). For the first time, a non-maritime entity such as petitioner would be explicitly recognized as a "performing party," which article 1.17 defines as

> a person other than the carrier that physically performs . . . any of the carrier's responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods, to the extent that that person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control, regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage.

Id. at 12. Substantively, article 4.2.1 proposes special liability rules to deal with the issues created by inland carriage, *id.* at 21, and article 6.3.1(a) would break through the privity of contract barrier to regulate direct actions by cargo interests against performing parties on defined terms, *id.* at 31. These controversial issues are specifically on the agenda for discussion at the next session of the UNCITRAL Working Group on Transport Law. *See* UNCITRAL, *Provisional Agenda [for the Eleventh Session]*, U.N. doc. no. A/CN.9/WG.III/WP.24, at 6 (Dec. 18, 2002).

Rather than attempting to resolve these controversies itself, this Court should permit the diplomatic and political process to run its course, so that the issues may be resolved in an appropriate forum where all of the affected interests are represented, where related issues can be considered in conjunction with each other (thus enabling balanced compromises to be achieved), and where the necessary legal and commercial expertise can be called upon to inform the decisions. Any decision by this Court in the meantime may have limited impact or even become moot (if the diplomatic and political process adopts a different approach).

C. This case presents a poor vehicle for deciding more generally when a freight forwarder may be deemed a cargo owner's agent

1. Norfolk Southern has taken inconsistent positions on the agency issue and thus its current arguments were never considered by the courts below. Petitioner now argues that ICC was an NVOCC and accepts that it assumed a carrier's liability under its contract with Kirby. *E.g.*, Pet. 14-15 n.4, 16. It simultaneously contends that ICC was Kirby's agent to conclude the contract with Hamburg Süd. Petitioner never explains how ICC could have been both principal and agent with respect to the same obligation – how it could itself assume the obligation for transporting the goods as a carrier while at the same time being simply an agent to contract on Kirby's behalf with another carrier that would assume the same obligation to the same person for transporting the same goods.

Petitioner never explained that inconsistency in the court of appeals either, or even gave the Eleventh Circuit an opportunity to address the contention. In the court below, petitioner had a single argument to explain why ICC must have been Kirby's agent: "ICC Ltd. Is Not An NVOCC Under U.S. Law And Therefore May Not Legally Assume The Role Of A Principal In This Transaction." Norfolk Southern C.A. Br. 25. The Eleventh Circuit described this argument and explained four reasons why it failed. *See* Pet. 10a & n.9; p. 7, *supra*.

In the face of that devastating response, petitioner has completely abandoned its prior argument and now advances the exact opposite of its original contention. Even if its new argument had any merit, this would be a poor vehicle for this Court to consider it. The orderly development of the law would be better served by reviewing a case in which the petitioner had taken a consistent position throughout the litigation, thus giving the lower courts an opportunity to test the arguments and offer their insights on how the arguments might apply in the factual context of the case.

2. Petitioner advances a parade of horribles that it claims will ensue under the Eleventh Circuit's decision, but this is all hyperbole with no basis in fact.[18] Even if the asserted problems were to arise in practice, it is noteworthy that they affect primarily vessel carriers. *See, e.g.*, Pet. 21 ("no vessel carrier will be able to enforce its own bill of lading"); 27 n.10 (asserting that slot charterers will be adversely affected by the decision below). In the unlikely event that any of these problems arise, therefore, it would be more appropriate for this Court to address them, if at all, in a case that concerns a vessel carrier.

II. The Himalaya clause issue does not warrant this Court's review

A. Petitioner improperly frames the question presented by ignoring a critical second aspect of the court of appeals' holding

This Court could decide Norfolk Southern's second question in petitioner's favor but still be obliged to affirm on the court of appeals' second ground for decision, which was that the ICC bill of lading lacked the "special degree of linguistic specificity [that] is required to extend the benefits of a Himalaya clause to an inland carrier." Pet. App. 16a. The court carefully analyzed the cases extending Himalaya clauses to protect inland carriers and concluded that in virtually all of them the bill of lading "specifically referenced inland carriers." *Id.* at 15a. Petitioner neither addresses nor challenges that aspect of the Eleventh Circuit's holding. Accordingly, petitioner has waived any claim that the Eleventh Circuit's "linguistic specificity" holding is erroneous. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 535-38 (1992) (the Court will not consider questions that had not been raised in the petition for writ of certiorari).

[18] One of the asserted problems – that this Court's failure to address the issue now will be exploited by forum shopping through *in rem* actions (Pet. 3 n.1) – is completely nonsensical. A railroad cannot be the subject of a maritime lien (an essential prerequisite to the filing of an *in rem* suit). *See* Fed. R. Civ. P. Supp. Admir. & Mar. R. C. So the notion that frustrated cargo owners will file *in rem* actions against a railroad's property in favorable forums lacks any grounding in reality.

B. In any event, this Court's review of the Himalaya clause issue is unnecessary

1. The Eleventh Circuit properly applied *Herd*, which held that a stevedore could not assert a carrier's defenses to liability. As this Court stressed, "contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries." 359 U.S. at 305. And it endorsed the "'familiar rules visiting liability upon a tortfeasor for the consequences of his negligence.'" *Id.* (quoting *Boston Metals Co. v. The S/S Winding Gulf*, 349 U.S. 122, 123-24 (1955) (Frankfurter, J., concurring)).

The decision below faithfully applied those principles. As the court noted, longstanding Eleventh Circuit precedent applied a "clarity of language test" that upheld enforcement of "a Himalaya clause only if it is drafted with 'language expressing a clear intent to extend the benefits to a well-defined class of readily identifiable persons'" and "only by members of that well-defined class." Pet. App. 12a (quoting *Hale Container Line*, 137 F.3d at 1465). That holding follows directly from this Court's admonition in *Herd* that courts should narrowly construe an extension of liability limitations by contract. 359 U.S. at 305.

In issuing that ruling, the court below neither explicitly nor implicitly issued a decision of broad scope. Rather, the court carefully parsed the language of the ICC bill of lading to hold that Norfolk Southern was not ICC's independent contractor, as the clause specified (Pet. App. 12a-14a), and that the railroad's status as an inland carrier required the bill of lading to specify with greater clarity an intent to include inland carriers before the Himalaya clause could be extended to them (*id.* at 15a-18a).

2. The Eleventh Circuit decision is not in conflict with the Ninth Circuit. Although Norfolk Southern accuses the court below of "misconceiv[ing] both the facts and analysis of *Akiyama*," Pet. 25 n.8, it is petitioner that mis-

reads the Ninth Circuit. As the court of appeals explained, the *Akiyama* court's statement that a party seeking to invoke the Himalaya clause need not be in privity with the carrier was *dicta*. Pet. App. 14a-15a n.11. The Ninth Circuit's result was consistent with the explanation given by the court below, because privity of contract is not necessary when the term being invoked in the Himalaya clause is descriptive, such as "stevedore" or "terminal operator." The court noted that, in *Akiyama*, the two parties that were permitted to invoke the Himalaya clause either met the privity of contract requirement or fell within the descriptive term of the Himalaya clause: the terminal operator was held to be an "independent contractor," and it was in contractual privity with the carrier, while the stevedore was not in privity but was covered by the definitional clause specifying "stevedores." *See id.*; *Akiyama*, 162 F.3d at 574. The court also explained that the *Akiyama* court's statements about privity were inconsistent with *Mori Seiki*, which had allowed a stevedore to claim Himalaya clause benefits only after establishing that contractual privity had been established with the carrier's agent. 990 F.2d at 450-51.

In contending that the court below "misconceives" the proper analysis (Pet. 25 n.8), Norfolk Southern misunderstands the meaning of *dicta*. The court in *Akiyama* would have come to precisely the same result under the Eleventh Circuit's articulation of the proper rule. Accordingly, the Ninth Circuit's statement about the privity requirement was unnecessary to its decision. Particularly because *Mori Seiki* is also consistent with the Eleventh Circuit's analysis, petitioner can offer no compelling reason why this Court should read a stray sentence in *Akiyama* that was unnecessary to its decision as creating a circuit conflict when one otherwise does not exist.

In view of the Eleventh Circuit's insight about the distinction between "relational" and "descriptive" terms in a Himalaya clause, the respective approaches of the Ninth and Second Circuits can now be reconciled without thinking that those circuits are in conflict. In *Mikinberg v. Baltic S.S. Co.*, 988 F.2d 327 (CA2 1993), the stevedore that was denied protection on the basis of a lack of privity had claimed the benefit of a Himalaya clause using relational terms. *See id.* at 332-33. Indeed, a square conflict would arise only if these two circuits were to go beyond their existing decisions in the following ways: If the Second Circuit follows its announced privity requirement even in a case involving a clause with "descriptive" language (*e.g.*, by denying protection to a sub-subcontractor stevedore despite the Himalaya clause's use of the term "stevedore"), and if the Ninth Circuit follows the *Akiyama dicta* in preference to *Mori Seiki* even in a case involving a clause with "relational" language (*e.g.*, by protecting a sub-subcontractor stevedore in reliance on the term "independent contractor" in the Himalaya clause), then there would be a square conflict. But, absent such holdings, petitioner has no basis for asserting that the decision below would have been different in any other circuit.

3. The Eleventh Circuit's decision neither "undermines the economic basis of international shipping transactions under the FBL" nor "destroys reliance interests." Pet. 28. As the court below explained, *see* Pet. App. 17a; p. 9, *supra*, the FBL Himalaya clause "was not designed" to extend the maritime liability regime to inland carriers.[19] Thus it is not surprising that Norfolk Southern was unable to cite a single case in which a court held that an

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[19] Petitioner calls it "passing strange" to interpret the Himalaya clause (FBL 10.1) to require privity when clause 10.2 provides that the freight forwarder shall act as "agent or trustee for such persons" as shall perform duties under the contract. Pet. 27-28. But there is nothing strange about that provision at all. The point of Clause 10.2 was to deal with the lack of an adequate third-party-beneficiary doctrine under English and Commonwealth law. *See generally* William Tetley, *The Himalaya Clause – Revisited*, 9 J. INT'L MAR. L. 40, 44 (2003). This clause allows the benefits of a contract to be extended under English law to "such persons" (the described third parties, who are in privity with the freight forwarder) without requiring the beneficiaries to also be in privity with the cargo owner.

inland carrier could invoke the Himalaya clause of the FBL.

Any "reliance" that Norfolk Southern asserts in this case is completely untenable for two independent reasons. First, Norfolk Southern is an inland carrier, and no circuit has ever allowed an inland carrier to claim the benefit of any Himalaya clause, whether in the FBL or any other form of bill of lading. The Third, Fourth, and Eleventh Circuits have all addressed the issue and all have denied Himalaya clause protection to inland carriers. *See Caterpillar Overseas, S.A. v. Marine Transp., Inc.*, 900 F.2d 714, 725-26 (CA4 1990); *De Laval Turbine, Inc. v. West India Indus., Inc.*, 502 F.2d 259, 269-70 (CA3 1974). There is no authoritative legal basis for Norfolk Southern's contention that an inland carrier would have been justified in relying on any bill of lading Himalaya clause, let alone the clause at issue here.[20]

Second, Norfolk Southern was a sub-sub-subcontractor of ICC, the issuing carrier. When ICC issued its bill of lading, in August 1997, the Second Circuit's *Mikinberg* rule denying Himalaya clause protection for lack of contractual privity was already well-established, and should have alerted Norfolk Southern that it could not rely on a Himalaya clause in this context. To the extent that any basis for reliance could have been created by the Ninth Circuit's *Akiyama dicta*, that court's decision was not rendered until 1998 – more than a year *after* Norfolk Southern's train derailed.[21]

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[20] Petitioner would also have been unjustified in relying on the phrase in the Himalaya clause covering "other person[s] . . . whose services have been used in order to perform the contract." *See* Pet. App. 67a. The courts of appeals have long held that such broad language does not provide the "clarity" required by this Court in *Herd*. *See, e.g., Rupp v. International Terminal Operating Co.*, 479 F.2d 674, 676-77 (CA2 1973); *Cabot Corp. v. S.S. Mormacscan*, 441 F.2d 476, 478 (CA2 1971). Petitioner cites no case to the contrary.

[21] This may explain why railroads rely on their own "privity of contract" argument, not Himalaya clauses. *See* pp. 18-19 & n.16, *supra*.

Like the agency issue, *see* pp. 20-21, *supra*, petitioner and other inland carriers are fully able to obtain the protection that they seek here simply by entering into appropriate contracts (if the other contracting parties agree). Indeed, the court below provided a road map for petitioner: including the words "inland carrier" in the Himalaya clause will obviate the need for the privity requirement (because "inland carrier" is a "descriptive" rather than a "relational" term) and will satisfy the "linguistic specificity" requirement. *See* Pet. App. 17a-18a. Moreover, Hamburg Süd demonstrated how easy it is to follow this road map, for it had already included adequate language in its Himalaya clause. In short, petitioner does not require this Court's protection. The commercial parties are fully capable of protecting themselves.

4. This Court's review of the second question is also unnecessary because the ongoing diplomatic efforts at UNCITRAL, *see* pp. 3-4, *supra*, are addressing the Himalaya clause issue. Recognizing the problems that have arisen over the years, article 6.3.3 of the current Draft Instrument provides automatic Himalaya protection, *i.e.*, extends the carrier's limitation rights, to certain parties that perform the carrier's responsibilities under the contract of carriage. U.N. doc. no. A/CN.9/WG.III/WP.21, *supra*, at 33. Although the basic concept has received strong support, it remains controversial which parties should qualify for protection. *See, e.g., Comments Submitted by the UNCTAD [United Nations Conference on Trade and Development] Secretariat*, in Annex II, U.N. doc. no. A/CN.9/WG.III/WP.21/Add.1, at 27 (Feb. 6, 2002); UNCITRAL, *General Remarks on the Sphere of Application of the Draft Instrument*, U.N. doc. no. A/CN.9/WG.III/WP.29, at 40 & n.20 (Jan. 31, 2003).

Rather than attempting to resolve the controversy itself, this Court should again permit the diplomatic and political process to run its course. *Cf.* pp. 21-22, *supra*. As with the agency question, the issues would be better resolved in a forum where all of the affected interests are

represented, where related issues can be considered in conjunction with each other, and where the necessary legal and commercial expertise can be called upon to inform the decisions. Any decision by this Court in the meantime may have limited impact or even become moot (if the diplomatic and political process adopts a different approach).

C. This case presents a poor vehicle for deciding when a Himalaya clause may by applied to performing parties that are not in privity with the issuing carrier

Even if this Court were to think that the hypothetical conflict presented by petitioner warranted attention at this time, this case would be a poor vehicle for addressing it. The Eleventh Circuit's alternative ground for decision (the "linguistic specificity" requirement), *see* pp. 8-9, *supra*, would make any decision on the privity issue irrelevant and advisory because the judgment below could be sustained on remand notwithstanding what this Court might hold on the privity issue.

Furthermore, a privity requirement is only significant when the parties appear to have intended the Himalaya clause to cover the defendant seeking protection but a lack of contractual privity would deny such protection. That is not true here. The court below specifically concluded, based primarily on the evidence of the principal authority that petitioner cites for its understanding of the FBL form, that the drafters of the ICC Himalaya clause did not envision its application to railroads and other inland carriers. *See* Pet. App. 17a (citing Ramberg, *supra*). That question necessarily involves an analysis of the Australian contracting parties' intent – not an issue of federal law – and for that reason as well this case presents a poor vehicle for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY PTY LTD D/B/A KIRBY ENGINEERING, MMI GENERAL INSURANCE, LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF

The court of appeals in this case decided two critical questions of federal maritime law, regarding the enforceability of bills of lading and the scope of Himalaya clauses, in conflict with the decisions of other courts of appeals and of this Court. Respondents fail to rebut the conflicts of authority and the importance of this Court's review, and their brief in opposition is rife with misstatements of both the case law and the proceedings below.

1. Respondents falsely claim that this case presents no important questions of federal law, but only factbound issues of contract interpretation. Opp. 2, 11. Respondents attempt to create confusion by combining two distinct issues, the first of which is not in dispute. Respondents argue that freight forwarders sometimes act simply as agents arranging transportation in the name of the cargo owner, thus assuming no liability for the safe delivery of the goods, and sometimes contract as a carrier and assume such liability. *Id.* at 3. But here there is no dispute as to the duties that the freight forwarder (ICC) assumed vis-à-vis the cargo owner (Kirby). The contract (the FBL) is plain on its face that the freight forwarder "assumes liability for the performance of the multimodal transport contract as a carrier." Pet. App. 54a.

Petitioner does not seek review of the contract, but instead challenges the *legal rule* announced by the Eleventh Circuit: because ICC contracted with Kirby as a carrier, ICC "did not act as Kirby's agent when it received the bill of lading from Hamburg Sud," and thus "Kirby is not bound by the Himalaya clause in the Hamburg Sud bill." Pet. App. 10a-11a. That rule squarely conflicts with the established rule of other courts of appeals and of this Court that by operation of law the primary carrier is the agent of the cargo owner in contracting with a secondary carrier. Pet. 14-20; *infra* at 2-5. Likewise, on the second question presented, the Eleventh

Circuit could not have more clearly decreed a federal rule of contract interpretation: "[i]n this Circuit . . . the law requires privity between the carrier and the party seeking shelter in the Himalaya clause." Pet. App. 13a-14a. It is these two critical questions of federal law that warrant this Court's review.[1]

2. On the first question presented, respondents fail to distinguish any of the conflicting decisions. There is a direct conflict with *Kukje Hwajae Insurance Co.* v. *M/V Hyundai Liberty*, 294 F.3d 1171 (9th Cir. 2002), *cert. pending sub. nom. Green Fire & Marine Insurance Co.* v. *M/V Hyundai Liberty*, 71 U.S.L.W. 3400 (U.S. Nov. 22, 2002) (No. 02-813). The Ninth Circuit squarely held that an intermediary non-vessel operating common carrier ("NVOCC") "acts as the agent of the cargo owner/shipper when it contracts with the ocean carrier to ship the cargo owner's goods," even though the NVOCC "'contracts with its customers as principal.'" *Id.* at 1176 (quoting M. Davies, *In Defense of Unpopular Virtues: Personification and Ratification*, 75 Tul. L. Rev. 337, 395-96 (2000)). Respondents predictably claim that the Ninth Circuit's ruling was wrong, decided without adequate briefing, and involved a different type of clause (Opp. 16-17), but these assertions are beside the point. *Kukje Hwajae* states the rule of the Circuit, and holds, in conflict with the Eleventh Circuit, that the cargo owner was bound by the bill of lading issued to the nonvessel carrier by the vessel carrier. 294 F.3d at 1175-77; *accord Morrow Crane Co.* v. *Affiliated FM Ins. Co.*, 885 F.2d 612, 613-14 (9th Cir. 1989) (freight forwarder that contracts with owner to ship cargo and separately enters into a contract in its own name with a carrier is nonetheless the cargo owner's agent in placing cargo with the carrier).

[1] Respondents do not contest the rule that bills of lading for international transportation of goods to the United States, which are subject to, and incorporate the mandatory terms of, the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. §§ 1300-1315, are governed by federal law. *See Wemhoener Pressen* v. *Ceres Marine Terminals, Inc.*, 5 F.3d 734, 741 (4th Cir. 1993) (citing cases); Pet. 1.

The conflict with the Second Circuit is equally stark. That court has held that "the NVOCC is a hybrid; it is a common carrier with respect to the shippers who use its services," but "[w]ith respect to the vessel and her owner, however, the NVOCC is an agent of the shipper, and thus merely a customer." *Insurance Co. of N. Am.* v. *S/S Am. Argosy*, 732 F.2d 299, 301 (2d Cir. 1984). Respondents are wrong in claiming (Opp. 18) that this rule was irrelevant to the outcome of that case; the vessel was deemed not to have ratified the NVOCC's separate bill of lading precisely because the NVOCC was an agent/customer, and not equivalent to a charterer. 732 F.2d at 303-04.

Stolt Tank Containers, Inc. v. *Evergreen Marine Corp.*, 962 F.2d 276 (2d Cir. 1992), is likewise in conflict with the rule below. Respondents wrongly state that the case did not involve a freight forwarder (Opp. 18); Stolt entrusted its cargo to Monsanto, which then shipped the cargo with (and received a bill of lading in its name from) Evergreen. 962 F.2d at 277-78. The Second Circuit squarely rejected the cargo owner's claim that it was not bound by a liability limitation in a bill of lading to which it was not a signatory. *Id.* at 279. Respondents point out that *Stolt* involved the mandatory liability limitation imposed by COGSA rather than a Himalaya clause, Opp. 18, but that is a distinction without a difference. COGSA imposes "compulsory terms" in a bill of lading, G. Gilmore & C. Black, Jr., *The Law of Admiralty* § 3-38, at 172 (2d ed. 1975), and those terms (just like a Himalaya clause) would be negated if the bill issued to the freight forwarder did not bind the cargo owner.

Respondents do not even attempt to distinguish *Nippon Fire & Marine Insurance Co.* v. *Skyway Freight Systems, Inc.*, 235 F.3d 53 (2d Cir. 2000), because they cannot. In *Nippon*, the Second Circuit (drawing upon a wealth of cases involving air, water, and rail transportation) held that under federal common law the primary carrier is the "agent" of the shipper in subcontracting with the secondary carrier for

transport of the goods, and thus a limitation-of-liability clause in the subcontract binds the cargo owner even though it was not an express party to the subcontract. *Id.* at 61.[2]

The Eleventh Circuit's decision also conflicts with multiple decisions of this Court. Respondents call the assertion of a conflict with *New Jersey Steam Navigation Co.* v. *Merchant's Bank*, 47 U.S. (6 How.) 344 (1848), "inexplicable" (Opp. 13), but it is only their arguments that are inexplicable. Respondents state that "the Court held that the vessel owner's limitation was *not* binding on the cargo owners." *Id.* at 14. To the contrary, the Court held that the cargo owners, claiming through the vessel carriers' subcontract with the nonvessel carrier, "must affirm its provisions," and that the vessel carriers "succeeded in restricting their liability as carriers by the special agreement," 47 U.S. at 381, 384. The Court simply construed the binding contractual liability limitation not to cover gross negligence, and affirmed the damages award because the cargo owners had proven gross negligence. *Id.* at 383-85. Furthermore, the Court held that the cargo owners were bound to the contract, not because of any third-party beneficiary theory as respondents surmise, but because of established law that a carrier, having no independent right of possession in the goods, "is considered in law the agent or servant of the owner." Thus, the primary carrier's subcontract with a secondary carrier is "in contemplation of law" a contract between the cargo owner and the secondary carrier. *Id.* at 380.[3] This Court in *Chicago,*

[2] *See also* Pet. 17-19 (discussing other circuits). Indeed, no case supports the Eleventh Circuit's rule. Respondents argue from general agency principles, Opp. 12, but the very treatises on which they rely reject those claims. P. Bugden, *Freight Forwarding and Goods in Transit* § 2-01, at 8 (1999) ("It is of course quite possible for the freight forwarder to act as agent to his customer and as principal to the third party, or indeed vice versa. In any event it is a fallacy to suppose that a person cannot be a party to a contract in two capacities, both as agent and principal.").

[3] Five justices concurring in the judgment agreed that the cargo owners were bound by the subcontract, *see also* 47 U.S. at 393 (Catron, J.), and

Milwaukee, St. Paul & Pacific Railroad v. *Acme Fast Freight, Inc.*, 336 U.S. 465 (1949), reaffirmed the *New Jersey Steam* rule that "the shipper is the undisclosed principal of its agent, the forwarder, in the latter's contract with the carrier." *Id.* at 488 n.27. Respondents deem *Acme* "irrelevant," Opp. 15, but it plainly states the established rule of common carrier law.

Respondents also cannot distinguish *Great Northern Railway* v. *O'Connor*, 232 U.S. 508 (1914). They wrongly claim that the *Great Northern* Court "viewed the freight forwarder simply as an agent and not as a carrier." Opp. 15. As is clear from the lower court opinion, however, the freight forwarding company "d[id] business in the nature of a common carrier," shipping consolidated cargo and receiving bills of lading from the railroad "in its name." *O'Connor* v. *Great N. Ry.*, 136 N.W. 743, 744 (Minn. 1912). In response to the owner's claim that she had only authorized the company to transfer her goods as a separate consignment, this Court held that the owner would be bound by the liability limitation in the contract between the company and the rail carrier "whether [the company] be treated as agent or forwarder." 232 U.S. at 514. This decision is irreconcilable with the rule below.[4]

the plurality opinion is the holding of the Court because it supplies the narrowest ground for decision among the concurring justices. *Marks* v. *United States*, 430 U.S. 188, 193-94 (1977).

[4] Respondents' argument that this is a poor vehicle to resolve the conflicts of authority because "it is unclear whether ICC was an NVOCC and the courts below never ruled on that issue," Opp. 16, is both irrelevant and highly disingenuous. First, most of the conflicting decisions do not even use the term NVOCC, and those that do base their holdings on general common carrier law (such as *Acme*). *See, e.g.*, *Argosy*, 732 F.2d at 301. Second, NVOCC is simply the common term in American maritime parlance, drawn from Congress's usage in the Shipping Act, for a freight forwarder like ICC. *See* P. Jones, *FIATA Legal Handbook On Forwarding* 52 (1991) ("A forwarder acting as a principal to a contract of ocean carriage is now sometimes called a Non-Vessel Operating Common Carrier, or NVOC"); H. Kindred & M. Brooks, *Multimodal Transit Rules*

3. Even aside from the numerous conflicts of authority, this Court's review is imperative because the decision below undermines COGSA. Pet. 21-22. Respondents try to skirt this issue with the irrelevant point that no "issue of COGSA construction" is raised. Opp. 2. But respondents do not (and cannot) deny that COGSA is only enforced by compulsory terms in the bill of lading, and if a carrier's bill of lading is unenforceable against the cargo owner, then COGSA's mandatory provisions are also unenforceable. Pet. 21-22; Opp. 24. Thus, under the Eleventh Circuit's rule, for the most common form of international transportation of goods (container shipments by freight forwarder), a vessel carrier could not invoke the statutory liability limitation of COGSA against the cargo owner for a loss occurring at sea, simply because the cargo owner was not a signatory of the bill of

5 (1997) ("Since forwarders own neither vessels nor vehicles, they take responsibility for the whole movement but procure its performance entirely through others (acquiring the moniker of non-vessel common carriers, or NVOCs).") (footnote omitted). Respondents indeed emphasized below that variations in terminology were immaterial; they chose to use the term "freight forwarder" because that was the term in the FBL, noting that "[w]hile NVOC is a common term internationally, Congress has preferred 'non-vessel-operating common carrier,' or 'NVOCC.'" C.A. Aplts. Br. 6. It is also a flat misrepresentation to say that "Norfolk Southern has taken inconsistent positions on the agency issue and thus its current arguments were never considered by the courts below." Opp. 23. Norfolk Southern *never* argued that ICC was not substantively an NVOCC. It argued only that "ICC Ltd. cannot claim NVOCC status under U.S. law because ICC Ltd. is not licensed as an NVOCC by the Federal Maritime Commission." C.A. Apllee. Br. 27. Respondents well understood this to be Norfolk Southern's NVOCC argument. *See* C.A. Aplts. Reply Br. 7 ("Norfolk Southern argues throughout its brief that ICC Ltd. cannot qualify as a 'carrier' because it did not have a Federal Maritime Commission ("FMC") license."). The Eleventh Circuit rejected this alternative argument, Pet. App. 10a n.9, and it is not renewed here. But the principal issue decided below of whether Kirby could be bound by the contract between the freight forwarder and vessel carrier was extensively briefed by both parties. C.A. Aplts. Br. 16-24; C.A. Apllee. Br. 19-24; C.A. Aplts. Reply Br. 3-6, 10-11. This question is cleanly presented for this Court's review.

lading. This Court cannot leave the Eleventh Circuit's effective nullification of the COGSA regime unreviewed. Furthermore, by permitting shippers and carriers "to contractually extend application of COGSA to the periods prior to loading and after unloading but before delivery, Congress authorized shippers and carriers to place all of their dealings under COGSA, if they so intend," in order to achieve "a greater degree of certainty and uniformity in their dealings." *Wemhoener Pressen*, 5 F.3d at 741. The enforceability of bills of lading, including their Himalaya clauses, cannot vary by circuit.

The decision below undermines significant reliance interests throughout the entire chain of subcontractors in international trade in goods, including all forms of inland carriers (as *amici curiae* attest). Pet. 20-21. Under the Eleventh Circuit's rule, a cargo owner can contract with a freight forwarder as carrier, pay only the lower rates associated with undeclared value that are based on COGSA liability limitations and the protections of Himalaya Clauses, and yet not be held to such limitations in a suit against any carrier that relied on them. Because the ruling below vitiates settled commercial understandings and creates windfalls for cargo owners and their insurers, *id.* at 22, this Court's review is imperative.[5]

[5] The reliance interests at stake cannot be narrowed just to Norfolk Southern's, Opp. 18-19, but even there respondents misconceive the railroad's interest. Whether cargo owners or carriers could bring suit, railroads set low rates based on ubiquitous Himalaya clauses and the universal practice of shippers not to declare value. Moreover, respondents' proposed "alternatives" are not viable. A common carrier (like a railroad) cannot "decline to participate in multimodal transactions" or "insist on its own contract with the cargo owner" (Opp. 21), *see Nippon*, 235 F.3d at 61, even if that were not wholly impractical, *see* Pet. 15-16. Indemnity clauses (Opp. 21) are also no substitute for limitation-of-liability clauses because of transaction costs and the risk of nonrecovery from the indemnitor. More fundamentally, no reason of law or policy justifies the cataclysmic reworking of commercial relationships that would be made necessary by the decision below.

4. Respondents' claim that ongoing discussion at UNCITRAL of proposals for a new international convention eliminates the need for review is specious. First, Congress has always charted a separate course in this area regardless of international conventions. COGSA is different from other countries' laws, and Congress has refused to ratify the Hague-Visby Rules, the UN's 1978 Hamburg Rules, or the 1980 Multimodal Convention. See M. Sturley, *Uniformity in the Law Governing Carriage of Goods by Sea*, 26 J. Mar. L. & Com. 553, 567-68 (1995); S. Mandelbaum, *International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay*, 5 J. Transnat'l L. & Pol'y 1, 21 (1995). Second, the UNCITRAL "Draft Instrument" is based on a draft revision of COGSA that languished in the Senate for years and was never introduced as legislation, before its advocates (including respondents' counsel) began working through UNCITRAL to achieve the same objectives.[6] Third, the UNCITRAL effort, commenced in 1996, has yielded only a proposed draft that (as respondents admit) has been heavily criticized on this issue, Opp. 29. Any new international convention, if it happens, is years if not decades away, and it is highly speculative (and indeed doubtful) that Congress would ever adopt it as U.S. law. COGSA, which authorizes the contractual extension of statutory liability limitations for any transit point from origin to destination, is the law of this land, and this Court should grant review to restore the clarity to federal law that the Eleventh Circuit has destroyed.

5. It is ironic that respondents disclaim a circuit split on the second issue presented, even though they have consistently acknowledged the split in the courts below. Pet. 23; Pet. App. 24a. Indeed, the stated rules of the respective circuits could not be more clearly in conflict. See Pet. 23.

[6] *See* J. Bonney, *Charting a New Course*, J. Com. Wk., Oct. 8, 2001, *available at* 2001 WL 30628746. As respondents' counsel has commented, "Congress is unwilling to act in a complex and technical field where it has little expertise and sees no opportunity for political gain." M. Sturley, *Proposed Amendments to the Carriage of Goods by Sea Act*, 18 Hous. J. Int'l L. 609, 613 (1996).

Contrary to respondents' claims, Norfolk Southern has properly challenged the Eleventh Circuit's judgment on the FBL Himalaya clause. The court's privity and inland-carrier analyses led to a single holding that the FBL does not identify petitioner as "a member of the 'well-defined class of readily identifiable persons' entitled to claim the benefits of the clause." Pet. App. 18a. Norfolk Southern challenges the Eleventh Circuit's construction based on the FBL's plain language, which extends the COGSA liability limitation to "any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract," Pet. App. 59a, and it has attacked the Eleventh Circuit's construction for excluding from the FBL's protections all those who "perform the actual transportation of the goods to their ultimate destination, including subcontracting ocean carriers, stevedores, terminal operators, *and inland carriers of any kind* (by air, water, road or rail)." Pet. 27 (emphasis added) (footnote omitted). The question presented is framed in terms of the privity requirement because (a) that is the basis of the circuit conflict justifying certiorari, and (b) that is the dispositive rule excluding Norfolk Southern from the protections of the FBL, Pet. App. 12a-13a, and indeed any comparable bill of lading for overseas transport, because inland American carriers will never be in privity with a foreign freight forwarder. The fact that the Eleventh Circuit declared that a *differently worded* FBL specifically referencing "inland carriers," *id.* at 17a, may have overcome the privity presumption and protected the railroad does not affect its disposition of this FBL.[7]

[7] Respondents wrongly claim that "no circuit has ever allowed an inland carrier to claim the benefit of any Himalaya clause." Opp. at 28. Both the Ninth and Seventh Circuits have done just that, in cases where the clauses do not specifically refer to "inland carriers." *See Caterpillar, Inc.* v. *Columbus Line, Inc.*, 19 F.3d 26 (9th Cir. 1994) (table), *available at* 1994 WL 59763, at **2; *Taisho Marine & Fire Ins. Co.* v. *Maersk Line,*

Respondents also now claim for the first time that the *Akiyama* rule is dicta, Opp. 26, but that rule is not dicta, as respondents suppose, simply because the Ninth Circuit could have "come to precisely the same result under the Eleventh Circuit's articulation of the proper rule." *Id.* As their statement concedes, the circuits apply different rules. The Ninth Circuit applies the comparison-of-services test and rejects privity, *Akiyama Corp. of Am.* v. *M.V. Hanjin Marseilles*, 162 F.3d 571, 574 (9th Cir. 1998); the Eleventh Circuit requires privity, but does not apply that requirement where the term at issue is "descriptive" (like "stevedore") rather than "relational" (like "independent contractor"). Pet. App. 14a n.11. Regardless of how the Eleventh Circuit would have applied its distinct rule to the contract in *Akiyama*, the rules are in conflict, and respondents do not dispute that under the *Akiyama* comparison-of-services test Norfolk Southern would be covered by the FBL clause. Pet. 24-25. Indeed, the dissenting judge below recognized the conflict, and stated that he "would follow the decision in *Akiyama*" and apply the comparison-of-services test to rule in favor of Norfolk Southern. Pet. App. 20a. As demonstrated in the petition, this ruling, like the first one, undermines significant reliance interests. Pet. 28-29. Respondents' contention that the FBL, the most important document in international trade, *id.* at 6, should be rewritten to accomplish what its plain language already conveys, Opp. 29, solely on account of an aberrant Eleventh Circuit decision, is no answer at all. This Court should decide the issue to provide uniformity in the law regulating the international movement of goods every day.

CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for writ of certiorari should be granted.

Inc., 796 F. Supp. 336, 342 (N.D. Ill. 1992), *aff'd*, 7 F.3d 238 (7th Cir. 1993) (table); *see also, e.g.*, *Aisin Seiki Co.* v. *Union Pac. R.R.*, 236 F. Supp. 2d 343, 347-48 (S.D.N.Y. 2002).

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No. 02-1028

IN THE
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY LIMITED D/B/A KIRBY ENGINEERING AND ALLIANZ AUSTRALIA LIMITED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

1. The government offers no explanation for its reformulated Question Presented, which alters the agency aspect of petitioner's Question 1 and omits the Himalaya clause aspect of Question 2. On the agency issue, the government never explains why this Court should override the contractual decision by Kirby and ICC under Australian law[1] for ICC to serve as "principal" in the transaction. *See* Pet. App. 8a, 67a (ICC undertakes "in [its] own name to procure the performance of the entire transport"). The government concedes the record does not show if ICC acted as an NVOCC, SG Br. 20; *cf.* Opp. 16-17, so no federal statutory issue is implicated in this case. The government's submission must be understood for what it is: a proposed rule, without any foundation in federal statute or this Court's maritime cases, to deny parties the contractual freedom to determine their own principal/agent relationship. And, to achieve that result, the government misstates the facts by casting the question in terms of "a railroad that subcontracted with the ocean carrier." SG Br. i.[2]

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[1] Notwithstanding the efforts by petitioner and the government to assert a federal "common law" issue, Australian law undoubtedly governs the interpretation of the ICC bill of lading. In this diversity suit, federal courts must follow Georgia choice-of-law rules. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). They require the application of Australian law. *See Convergys Corp. v. Keener*, 276 Ga. 808, 811, 582 S.E.2d 84, 86 (2003) (reaffirming *lex loci contractus* rule). *See also* Pet. App. 67a (clause 19 providing that actions under ICC bill "shall be decided according to the law of [Australia]"). (Pet. App. 65a-68a mixes pages from the ICC bill, *id.* at 65a & 67a, and the Hamburg Süd bill, *id.* at 66a & 68a.) We disagree with any suggestion that Kirby waived the choice-of-law argument on the Himalaya clause issue. *See infra* at 10. Significantly, the government does not dispute that Australian law governs the agency issue. *Cf.* SG Br. 13.

[2] The record is clear that Norfolk Southern did not contract with Hamburg Süd. Indeed, petitioner rejected Kirby's initial claim because "the rail services buyer is Columbus Line USA Inc." Opp. 19. Twice the government recognizes (as did the district court, Pet. App. 28a) that Columbus Line is a separate corporate entity apart from Hamburg Süd. *See* SG Br. 4, 19. But twice the government "pierces the corporate veil" (with no justification) to assert that petitioner contracted with Hamburg

On the Himalaya clause issue, the government's reformulated question is curiously silent, but abandoning petitioner's language implicitly acknowledges its inadequacy. *See also infra* at 4-5 & n.6. The government's reformulation does not raise the Himalaya clause issue at all. The government asks whether Kirby is "bound by liability limitations in the intermediary's [ICC's] bill of lading," SG Br. i, but that formulation misunderstands the problem. Kirby has always acknowledged that it is bound by the ICC bill. The Himalaya clause issue (omitted from the government's Question) is whether a sub-sub-sub-contracting railroad can benefit from those limitations.

2. The government suggests that there is a circuit conflict on "the nature of the relationship *that is presumed to exist* between a cargo owner and a shipping intermediary . . . when the *governing contract and the surrounding circumstances do not clearly establish* the nature of that relationship." SG Br. 7 (emphases added). In thus framing the issue, the government gravely distorts the record in this case and the decisions of other courts of appeals that have construed bills of lading. First, this case cannot be part of any such conflict because "the governing contract and the surrounding circumstances" *do* "clearly establish the nature of th[e] relationship" between Kirby and ICC. In the courts below, everyone recognized that the choice was whether ICC was (1) a principal, thus assuming responsibility as "carrier," or (2) Kirby's agent, thereby responsible only for arranging transportation on Kirby's behalf. Pet. App. 7a-9a; *see also* JAN RAMBERG, THE LAW OF FREIGHT FORWARDING AND THE 1992 FIATA MULTIMODAL TRANSPORT BILL OF LADING 7 (1993) (explaining that ICC's standard form was drafted to make that choice unambiguously); Shipping Act of 1984, 46 U.S.C. app. § 1702(6), (17) (congressional recognition of the same alternatives). In the court of appeals, petitioner argued that ICC was an

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Süd. *See* SG Br. i, 16-17; *cf. United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998) (discussing the "bedrock principle" of "respect for corporate distinctions" in a parent-subsidiary context).

agent because it *could not* be an NVOCC and thus could not be a principal. *See* Pet. App. 10a n.9. Only in this Court has petitioner finally acknowledged that ICC was indeed a principal. But petitioner now offers the wholly new argument – never raised or considered below – that ICC was both a principal and an agent with respect to the same obligation. This new position abandons the clear line between the principal/agent roles that the industry generally accepts, that petitioner advocated below, and that the Eleventh Circuit adopted. The government does not contend the Eleventh Circuit erred in construing the contract to hold that ICC was a "principal." Pet. App. 6a-11a. It instead offers a theoretical conflict not encountered by the court below. Unless this Court intends to ignore the court's fact-based conclusions, this case is not a suitable vehicle for resolving any "conflict" that may exist as to what courts should "presume[]" absent "clearly establish[ed]" facts.[3]

Second, the cases cited by the government (at 7) as conflicting do not announce a presumed background rule. In *Kukje Hwajae Insurance Co. v. M/V Hyundai Liberty*, 294 F.3d 1171, 1175 (CA9 2002) (emphasis added), *petition for cert. pending sub nom. Green Fire & Marine Ins. Co. v. M/V Hyundai Liberty*, No. 02-813 (filed Nov. 22, 2002), the court specifically rested its decision on "*the facts of this case*"[4] for its conclusion that "Glory Express was acting as Doosan's agent." Although the Ninth Circuit erred, the errors were interpretations of facts and the application of the Shipping Act. The court nowhere derived, or purported to derive, its holding from any background rule.

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[3] The government also concedes that the record here creates a poor vehicle to resolve generally applicable agency issues. *See* SG Br. 20.

[4] The government argues that, if certiorari were granted in *Green Fire*, "the parties likely would disagree whether the [Ninth Circuit] correctly construed the . . . Glory Express-Doosan bill of lading." SG *Green Fire* Br. 11, No. 02-813. Yet the parties' disagreement over the Eleventh Circuit's construction of the ICC bill of lading is the issue presented here and would be central to the merits arguments.

In *SPM Corp. v. M/V Ming Moon*, 22 F.3d 523, 524 (CA3 1994), the court specifically said that "[t]he underlying facts are not in dispute" in the sentence immediately preceding its statement that Blue Anchor was an NVOCC. Thus, the Third Circuit had no basis to "presume" a principal/agent relationship or to apply a "background" rule of law in drawing its conclusion. Similarly, in *Insurance Co. of North America v. S/S American Argosy*, 732 F.2d 299, 300-01 & n.2 (CA2 1984), the court specifically found that the intermediary met the regulatory requirements for NVOCC status. But the case did not turn in any way on the principal/agent status of an intermediary. *Id.* at 302-03.[5] Those cases, therefore, do not support the government's assertion that "the Eleventh Circuit has adopted a conflicting rule." SG Br. 8.

3. On petitioner's Question 2 concerning the "privity" required for Himalaya clause protection, the government acknowledges that every circuit except the Ninth agrees with the Eleventh. *See* SG Br. 8-9. But the government never addresses the Eleventh Circuit's explanation that the Ninth Circuit's *Akiyama* language was "*dicta*" that was "contradict[ed]" in *Mori Seiki USA, Inc. v. M.V. Alligator Triumph*, 990 F.2d 444, 450-51 (CA9 1993). *See* Pet. App. 14a-15a n.11. Before granting certiorari, this Court ordinarily gives a court of appeals an opportunity to resolve an intra-circuit conflict. *See, e.g., Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). The Ninth Circuit should have an opportunity to decide, in light of the Eleventh Circuit's thoughtful approach, whether to extend the *Akiyama dicta* to a court holding that could then be reviewed by this Court if the issue were important enough.

Such percolation is all the more appropriate here because the government ignores the Eleventh Circuit's sec-

[5] The holding concerns "the doctrine of ship-ratification," which has nothing to do with the decision below. 732 F.2d at 303.

ond independent basis for rejecting petitioner's claim: "the principle that a special degree of linguistic specificity is required to extend the benefits of a Himalaya clause to an inland carrier." Pet. App. 16a; *see also* Opp. 24-25. Neither petitioner's nor the government's Questions Presented addresses that aspect of the court of appeals' holding, thus raising the specter that anything this Court might conclude on the privity issue would be irrelevant to the ultimate disposition of the case.[6]

Nor do petitioner or the government cite any appellate decision in conflict with the Eleventh Circuit's alternate rationale for its holding. Indeed, no reported court of appeals' decision has ever held that any Himalaya clause protects an inland carrier. *See* Opp. 28.[7] And the govern-

[6] We noted petitioner's waiver of the "inland carrier" issue. *See* Opp. 24-25. Petitioner's response that "[t]he court's privity and inland-carrier analyses led to a single holding" (Reply Br. 9) ignores the problem. The Eleventh Circuit had two independent grounds for its "single holding," either one of which was adequate to support that holding. Petitioner challenged only the first ground. (Its discussion of the decision below does not even mention the second ground, *see* Pet. 11, let alone challenge it, *cf.* Pet. 25-29 (discussing only the privity analysis).) Petitioner argues that it addressed only privity because that is the issue on which certiorari is "justif[ied]." Reply Br. 9. That argument implicitly concedes that certiorari is *not* justified on the inland-carrier issue. (Petitioner also argues that the privity analysis "is the dispositive rule," *id.*, but ignores that the inland-carrier analysis is equally dispositive.) Because the Eleventh Circuit's Himalaya clause holding is supported by an independent and adequate rationale that petitioner did not raise in its Questions Presented, that petitioner implicitly concedes to be uncertworthy, and that the government omits from its Question Presented, this Court should decline to review the issue.

[7] In addition to the decision below, two other circuits have rejected similar arguments. *See Caterpillar Overseas, S.A. v. Marine Transp. Inc.*, 900 F.2d 714, 725-26 (CA4 1990); *De Laval Turbine, Inc. v. West India Indus., Inc.*, 502 F.2d 259, 269-70 (CA3 1974). We cited these cases, Opp. 28; petitioner's reply brief ignored them. The government cites *Caterpillar* (at 8, 18) but not *De Laval*. Indeed, petitioner has found only two appellate decisions – in the 44 years since *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959) – that extend Himalaya clause protection to an inland carrier. *See* Reply Br. 9-10 n.7. Neither decision was reported, so it is unclear what the Himalaya clauses provided or what arguments the courts considered.

ment is simply wrong to say there is "no basis" for that distinction. COGSA is a maritime statute; the Hague and Hague-Visby Rules are maritime conventions. Himalaya clauses extending the benefits of these maritime rules to non-maritime parties *should* be strictly construed, lest rules designed for sea carriage be applied outside of their intended context. *See also* Pet. App. 16a-18a (reviewing evidence that the ICC Himalaya clause was not expected to govern inland carriers).[8]

4. The government asserts that this Court's review is necessary because the railroads are unable to fend for

[8] The anomaly of applying holdings across carriage regimes is demonstrated in *Nippon Fire & Marine Insurance Co. v. Skyway Freight Systems, Inc.*, 235 F.3d 53 (CA2 2000), cited by the government (at 19) and petitioner (Reply Br. 3-4). First, the case involves a distinctive liability regime for air carriage. *See* 235 F.3d at 59 (interpreting Airline Deregulation Act of 1978). Second, the court appears to be confused about subcontracting. The court initially says that Skyway subcontracted with United and USAir. *Id.* at 56, 61. But then it changes its analysis completely and says that the plaintiff was Skyway's "undisclosed principal" and that Skyway was the plaintiff's "agent," presumably to contract with United and USAir. *Id.* at 61-62. Whatever its confusion, the court did not apply a rule of law that a "principal carrier" is always the shipper's agent to contract with "secondary carriers." The court admits the possibility that "other circumstances might exist in which secondary carriers may be held liable to shippers in tort," but notes that "the facts of this case . . . do not present any such circumstance." *Id.* at 62 n.4. By contrast, the court below meticulously reviewed the facts and decided that ICC was not Kirby's agent to contract with Hamburg Süd. Third, *Nippon* arises in a completely different business environment. Whereas the Skyway contract of carriage "lacked a 'Himalaya clause,'" *id.* at 60, maritime bills of lading routinely contain such clauses. Nothing indicates whether parties such as Skyway behave in anything resembling the same way as Australian freight forwarders. The specific details of the transaction were key to the Eleventh Circuit. The *Nippon* court did not reveal those details. Rather, the statement cited by petitioner was made in reliance on cases that obviously arose in a different factual context. *See id.* at 61 (citing *Great Northern Ry. Co. v. O'Connor*, 232 U.S. 508 (1914), in which the intermediary concededly was the owner's agent for purposes of contracting with the performing carrier). In any event, this Court has rejected the argument – at the government's urging – that a "federal common law" governs in the air carrier context. *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 232 (1995).

themselves in the commercial marketplace. *See* SG Br. 15 n.5. That assertion is remarkable, in light of the complete absence of cases raising the issues presented in this case against railroads and the well-established practices in numerous countries that recognize Himalaya clauses. The government acknowledges that the liability issue here "could have been addressed by a 'circular indemnification' arrangement." *Id.* Yet the government rejects that free-market alternative as "cumbersome," *id.*, and instead advocates a one-size-fits-all "background" rule that would comprehensively preempt state tort law and interfere with private parties' freedom to enter into contracts. In fact, such contractual arrangements – no more cumbersome than a Himalaya clause – are used routinely throughout the common law world. *See, e.g.*, Robert Newell, *"Privity Fundamentalism" and the Circular Indemnity Clause*, 1992 LLOYD'S MAR. & COM. L.Q. 97, 97. Norfolk Southern does not need this Court's help.[9]

[9] The same is true in the political arena. The government's proposed "background" rule is better suited to legislative solution than incremental common law development. In Congress, all interested parties can participate in a comprehensive compromise. But railroads have consistently *rejected* legislative proposals to extend maritime limitations of liability inland. Thus, the government's assertion that the ongoing UNCITRAL negotiations "are not likely to resolve the issues addressed in this brief" (SG Br. 11 n.3) is incomplete. The assertion presumably relates only to Himalaya clauses, for the UNCITRAL negotiations have long been premised on the assumption that an intermediary acting as "carrier" does not act as the cargo owner's agent to subcontract with performing parties. It is true (as of the October 2003 session) that the negotiations are unlikely to produce automatic Himalaya protection for inland carriers. The proposed convention now appears likely to give automatic Himalaya protection only to *maritime* performing parties, itself a significant result. The Court may wish to know what approach the international community will take before addressing the government's argument that inland carriers should receive, in effect, what the international community decides not to provide. Moreover, a principal reason inland carriers will be excluded from the new convention is because petitioner's *amicus* AAR insisted (on the basis of its strong political power) that North American railroads must be excluded. This position hews to the line initially taken by petitioner that Kirby could not recover because it lacked privity of contract with petitioner. Having rejected legislative solutions to preserve their own archaic privity

5. On the merits, the government offers not a rule of law compelled by this Court's cases, but a policy proposal that eviscerates the details of private contracts so that each actor in a through bill of lading deemed by a court to be "foreseeable and essential to fulfillment of the contract" (SG Br. 18) enjoys the benefit of a limitation of liability. But that proposed rule – based on *dicta* in old non-maritime cases – would nullify this Court's more recent and apposite decision in *Herd*. Under the government's policy proposal, inland carriers would be protected under through bills of lading regardless of what the Himalaya clause actually says. Indeed, a clause specifically *excluding* inland carriers from the list of beneficiaries would be irrelevant. If a Himalaya clause's wording is irrelevant, then the clause itself is irrelevant. That is directly contrary to *Herd*, which no one has argued should be overruled.

Herd clearly stated the rule that "contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries." 359 U.S. at 305. The government nowhere cites, quotes, or discusses that language – the foundation on which bills of lading have been drafted and litigated for more than 40 years. Instead, the government asserts as a "dispositive fact" the "clear" language of clause 10.1 in the ICC bill of lading ("independent contractor . . . whose services have been used in order to perform the contract"). The government does not address the Eleventh Circuit's reasons why that contract language does not extend to petitioner, which after all was *not* ICC's "independent contractor," but rather the independent contractor of Columbus Line, ICC's sub-subcontractor. *See* Pet. App. 12a-15a.

6. The government's argument on the merits also rests on the erroneous view that the ICC bill of lading "clearly

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analysis, *see* Opp. 19 n.16, the railroads now ask this Court to limit their liability without making any concession to other interests, and attack an accepted privity analysis in construing Himalaya clauses in the process.

extended the $500-per-package liability limitation to the inland transport of Kirby's goods from Savannah to Huntsville." SG Br. 16. There was no such extension, let alone a "clear" one. The $500 figure limits liability – even for claims against ICC itself – only "under COGSA, where applicable." Clause 8.6(b), Pet. App. 67a.[10] Under clause 7.3, COGSA "shall apply" only "if compulsorily applicable." And, under COGSA § 1(e), 46 U.S.C. app. § 1301(e), the statute by its own terms does not apply after "the time when the goods . . . are discharged from the ship," which in this case happened in Savannah. ICC actually limited its liability for damages during inland transport to either (a) the full value of the goods, under clause 8.6(a) and the Carmack Amendment,[11] or (b) 2 SDRs per kilogram, under clause 8.3 (which is about $450,000 in this case).

7. The government twice asserts that petitioner carried the goods under a contract that incorporated the Hamburg Süd bill of lading. *See* SG Br. 4-5, 18. Nothing in the record indicates the nature of the contract between petitioner and Columbus Line (except for petitioner's repeated assertion that Kirby was not a party to this contract and had no rights under it). In fact, the government reveals for the first time (based on petitioner's undocumented *ex parte* assertion with no record support) that petitioner's arrangement with Columbus Line was "contract carriage" under 49 U.S.C. § 10709. *See* SG Br. 12. Although that contract is not in the record, and thus we cannot know what it provides, it would be highly unusual (to say the least) if it really incorporated the Hamburg Süd bill of lading.

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[10] When COGSA is not "applicable," other limitation amounts govern. *See, e.g.*, Clauses 8.3, 8.5, 8.6(a) (imposing other – generally higher – limitation amounts in non-COGSA situations). Pet. App. 67a.

[11] The government is correct to note that the Carmack Amendment might apply in this case, *see* SG Br. 11-12, but wrong to suggest that the argument has been waived. A party is not required to raise every possible issue on an interlocutory appeal. The entire point of an interlocutory appeal is to focus on the "controlling question of law," 28 U.S.C. § 1292(b), that the district court has certified, not to address every issue that might be addressed over the course of the litigation.

8. In advocating a new "background" rule, the government quotes selectively from respondents' court of appeals brief to intimate (inaccurately) that we have conceded that United States federal law governs the Himalaya clause issue. *See* SG Br. 13. To the extent we have relied on general maritime law principles or cases that advocate construing bills of lading to achieve international uniformity, *see* Resp. C.A. Br. 46, these are principles that are common to the United States and Australia (and most of the maritime world). *Cf. Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537-38 (1995) (recognizing need for international uniformity in this field). The *Herd* Court followed Australian law in reaching a conclusion that would promote international uniformity, *see* 359 U.S. at 307-08, and the British House of Lords, in turn, followed *Herd*, *see Scruttons Ltd. v. Midland Silicones Ltd.*, [1962] A.C. 446. But, as soon as this Court tries to develop new "background rules" that go beyond widely accepted norms of contract interpretation, it needs to focus more directly on what law properly governs. In this case, construction of the bills of lading is governed by Australian law. *See supra* at 1 & n.1.[12]

CONCLUSION

For the foregoing reasons and those stated in the brief in opposition, the petition should be denied.

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[12] The government's citation (at 13) of *Wemhoener Pressen v. Ceres Marine Terminals, Inc.*, 5 F.3d 734, 741 (CA4 1993), is off-point, but instructive. The pertinent issue (unlike here) was the contractual incorporation of COGSA into a bill of lading. *Id.* at 740. (By their own terms, the provisions incorporating COGSA into the ICC bill do not apply to Norfolk's inland accident. *See supra* at 8-9 & n.10.) *Wemhoener* noted the complexity of the incorporation issue by observing that circuits are divided on whether federal or state law applies to construe such a contract. *See* 5 F.3d at 739-40. Here, the issue is the meaning of "independent contractors" in the Himalaya clause. That contractual term would be construed not under some free-floating federal common law but according to the governing choice-of-law rules (which here point to Australian law). Indeed, the court of appeals' cases cited throughout both parties' briefs here typically turn, as they should, on the wording of the applicable bill of lading. *See* Opp. 26-28 (collecting cases).

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December 10, 2003

No. 02-1028

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY PTY LTD D/B/A KIRBY ENGINEERING, MMI GENERAL INSURANCE, LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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SUPPLEMENTAL BRIEF

At the invitation of this Court, the Solicitor General has filed a brief on behalf of the United States recommending that the Court grant the petition on both questions presented. U.S. Br. 1. The Government has agreed with petitioner that genuine conflicts of authority exist as to both questions, *id.* at 7-9, and that the conflicts "create serious practical problems for shippers and carriers," *id.* at 9. As the Government notes, international trade cannot flow efficiently without certainty as to which party bears the risk of loss. *Id.* Under the auspices of COGSA, an efficient system has evolved where ocean and inland carriers transport cargo at low rates and with low transaction costs in reliance on the enforceability of standard limitation-of-liability clauses in a through bill of lading against all persons with interests in the property; cargo owners are responsible for insuring against the risk of loss above the contractual amount. Although developments in international trade, particularly the container revolution, "have made third-party enforcement of Himalaya Clauses critically important in international ocean shipping," *id.* at 9, the Eleventh Circuit has now issued rulings that make the vessel carrier's bill of lading unenforceable against cargo owners (by both vessel carriers and inland carriers), and the liability limitations of the standard *multimodal* bill of lading used in international trade unenforceable by inland carriers. Because certainty is critical in this area of the law, because carriers cannot feasibly contract around the Eleventh Circuit decision, *id.* at 14-15, because a carrier's liability should not vary as cargo crosses the jurisdictional lines of the various circuits, and because the decision below was clearly wrong, *id.* at 16-20, the Government properly urges this Court to grant certiorari.

Respondents have filed a supplemental brief in reply to the United States. Much of that brief does not warrant any response because it does not rebut the Government's reasons for granting the petition; instead, it attempts to avoid review

by rehearsing its merits arguments. Nonetheless, there are a few points that warrant a brief response.

1. There are many complex issues surrounding international transportation contracts. The Government has carefully analyzed issues that sometimes arise regarding such contracts, and correctly concluded that none of those issues affects this Court's review of the case. U.S. Br. 11-13. Indeed, the virtue of this case as a vehicle of review is that all such subsidiary issues are swept away because, by joint request of the parties, the district court certified the questions presented as "controlling question[s] of law" under 28 U.S.C. § 1292(b) to obviate the need for trial of any other issues.

a. The Carmack Amendment, when it applies, imposes requirements upon railroads that seek to limit their liability to shippers. U.S. Br. 11. As the Government notes, there is no Carmack issue in this case. The Carmack Amendment does not apply at all to contract transportation, such as occurred here, and most multimodal container traffic is contract transportation exempt from Carmack. U.S. Br. 12; 49 U.S.C. § 10709(b). Furthermore, where it applies, the Carmack Amendment provides an exclusive cause of action for a person causing loss or damage of property by a rail carrier and preempts state law. *Id.* § 11706(d); *Adams Express Co.* v. *Croninger*, 226 U.S. 491, 505-06 (1913). Respondents never asserted a federal Carmack claim in their complaint; instead, they asserted "state law causes of action" for negligence, recklessness, bailment and breach of contract. Pet. App. 37a.

Respondents weakly suggest that they could still raise a Carmack issue and were not bound "to raise every possible issue on an interlocutory appeal." Resp. Supp. Br. 9 n.11. That is not so. If respondents had had any good-faith arguments that the Carmack Amendment precluded enforcement of the liability limitations in this case, then the questions presented could not have been certified by the district court as "controlling question[s]" the resolution of which "may materially advance the ultimate termination of the litigation." 28

U.S.C. § 1292(b). Indeed, in urging the Eleventh Circuit to grant a permissive appeal of the certified order, respondents represented that the issue of Norfolk Southern's rights under the Himalaya Clauses was not only controlling but "the one question of law that really matters in the future conduct of this litigation," and thus "[i]f the district court's order is upheld on appeal, the case will undoubtedly settle for the limitation amount and no trial will be held." Resp. C.A. Pet. 10. In any event, respondents do not dispute the Government's point that they have waived any reliance on the Carmack Amendment in this Court because they never raised it in their brief in opposition. U.S. Br. 12; Sup. Ct. R. 15.2.

If anything, the Carmack Amendment underscores the broad importance of resolving the first question presented. The Carmack Amendment, where it applies, authorizes a rail carrier to limit its liability "to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier." 49 U.S.C. § 11706(c)(3)(A). For those international container shipments subject to the Carmack Amendment, the "shipper" purchasing rail services will be the vessel carrier or the freight forwarder. If the shipper cannot bind the cargo owner in this transaction – and it cannot under the Eleventh Circuit's rule – then the statutory liability-limitation provisions of the Carmack Amendment are ineffective. The decision below upsets basic principles of carrier law that are vital to the enforcement of federal statutory law governing both inland and ocean carriers. See also Pet. 26 (discussing effect on COGSA).

b. The Government also correctly notes that the Eleventh Circuit decided this case on the basis of federal law; that the applicability of federal law was undisputed below; and that respondents affirmatively represented to both the district court and the court of appeals that federal law applied. U.S. Br. 13. Indeed, respondents argued that petitioner's liability "must be determined" by the federal caselaw following *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297

(1958), Resp. C.A. Br. 46, and that this case implicated a "well-established conflict in authority between two of the leading maritime circuits" on the application of the *Herd* rule to Himalaya clauses of this kind. Resp. C.A. Pet. 12-13. Respondents even told the Eleventh Circuit that in resolving the conflict "it must choose between two competing lines of jurisprudence arising under the Carriage of Goods By Sea Act" and "should be guided by which approach better promotes national and international uniformity." Resp. C.A. Br. 46.

Now, for the first time ever in the case, respondents assert that "Australian law undoubtedly governs the interpretation of the ICC bill of lading," Resp. Supp. Br. 1 n.1, and not *Herd* and the other federal precedents upon which respondents relied in securing victory below. As the Government points out, respondents have waived any such claim in this Court because they did not raise it in their brief in opposition. U.S. Br. 13; Sup. Ct. R. 15.2. Moreover, as the Government further notes, respondents also waived any such claim below by not raising it in either the district court or the court of appeals; indeed, they not only waived this argument, but they are judicially estopped from asserting it by their affirmative positions to the contrary. Respondents never claimed Australian law applied (as they admit, Resp. Supp. Br. 10), and indeed never submitted the required proof of Australian law. *The Scotland*, 105 U.S. 24, 29 (1881) (applying federal maritime law in the absence of proof of foreign law because the latter is not subject to judicial notice). Even now, respondents disavow any conflict between federal and Australian law, which would have been the only colorable reason even to consider foreign law. Resp. Supp. Br. 10.

Moreover, respondents would not have prevailed even if they had attempted to argue foreign law. They do not and cannot cite a single case holding that an international through bill of lading for transportation of goods to the United States, in which the mandatory terms of COGSA are incorporated, is governed by foreign law even if the bill was executed abroad.

By contrast, the leading courts of appeals decisions hold that the terms of those bills of lading (including Himalaya Clauses) are governed by federal law because of the incorporation of COGSA. *Wemhoener Pressen* v. *Ceres Marine Terminals, Inc.*, 5 F.3d 734, 741 (4th Cir. 1993) (citing cases). Indeed, this Court has long held that all bills of lading for interstate transportation are governed by federal common law, *Cincinnati, New Orleans, & Tex. Pac. Ry.* v. *Rankin*, 241 U.S. 319, 326-27 (1916), regardless of where the bill was issued, and respondents marshal no support for their claim that a different rule applies to foreign commerce.[1]

The critical point is that the Eleventh Circuit (at respondents' urging) decided these issues under federal law. As the Government indicates, this Court is entitled to decide the case

[1] Although the untimely and cursory conflict of laws analysis that respondents undertake (Resp. Supp. Br. 1 n.1) is irrelevant, it is also flawed. Respondents cite only a Georgia case applying the rule of *lex loci contractus* to a domestic employment contract, *Convergys Corp.* v. *Keener*, 582 S.E.2d 84, 86 (Ga. 2003). They simply ignore this Court's holding in *Rankin* that interstate bills of lading are governed by federal law, regardless of where the bill was issued, and all the governing case law as to the effect of COGSA on international bills of lading for shipment into the United States. The central feature of COGSA is that it operates by imposition of "compulsory terms" in every bill of lading for shipment to and from the United States. G. Gilmore & C. Black, Jr., *The Law of Admiralty* § 3-38, at 172 (2d ed. 1975). Thus, on the agency issue, for example, if a bill of lading governed by COGSA and issued to a freight forwarder were unenforceable against the cargo owner, the federal statute would be frustrated because the mandatory statutory liability limitations would be nullified. Federal law governs to prevent "'material prejudice to the characteristic features of the general maritime law or interfere[nce] with the proper harmony and uniformity of that law in its international and interstate relations.'" *Am. Dredging Co.* v. *Miller*, 510 U.S. 443, 447 (1994) (quoting *S. Pac. Co.* v. *Jensen*, 244 U.S. 205, 216 (1917)). There can be no doubt that federal policy requires application of federal law. *See* U.S. Br. 13 (discussing factors). Furthermore, because "Congress authorized shippers and carriers to place all of their dealings under COGSA, if they so intend," federal law pervades international shipping contracts, and governs the interpretation of those bills, including Himalaya Clauses extending COGSA liability limitations inland. *Wemhoener*, 5 F.3d at 741.

on that basis without taking a position on *post-hoc* choice-of-law arguments that were never raised below. U.S. Br. 13. There can be no dispute about the broad importance of uniform federal law on the enforceability and interpretation of bills of lading for interstate and foreign transportation, *see Rankin*, 241 U.S. at 326-27 (federal common law applies to interstate bills of lading); *Herd*, 359 U.S. at 300, 305-08 (applying federal "common law as declared by this Court" to Himalaya clause of ocean bill of lading for foreign transport); 49 U.S.C. § 80101 *et seq.* (Bill of Lading Act), and no reasonable argument that federal law does not apply to bills of lading for foreign shipments into the United States by operation of COGSA, *Wemhoener*, 5 F.3d at 741. For all the reasons stated in the petition and the Government's brief, it is imperative that this Court resolve the federal questions presented.

c. Respondents persist in arguing that the UNCITRAL negotiations are a reason to delay review, notwithstanding the State Department's position that those negotiations "are not likely to resolve" the questions presented. U.S. Br. 11 n.3. If anything, the UNCITRAL negotiations provide further reason for this Court to resolve these questions now. The draft instrument proposed by the United States provides that "the liability of an inland carrier (e.g., a truck or railroad) should be based on existing law." *Transport Law: Preparation of a Draft Instrument on Carriage of Goods [by Sea]; Proposal by the United States of America* ¶ 7, U.N. GAOR, 12th Sess., U.N. Doc. A/CN.9/W.G.III/WP.34 (2003). The U.S. proposal further clarifies that "[p]reserving the status quo in this regard would, of course, preserve whatever rights an inland performing party may have under applicable national law to rely on a Himalaya Clause to claim the benefit of the contracting carrier's rights under the Instrument." *Id.* Because existing law is maintained under the U.S. proposal, it would advance the UNCITRAL negotiations, and subsequent congressional consideration of the convention, for this Court to clarify existing law.

2. The Government agrees with petitioner that the conflicts of authority identified in the petition are genuine. Respondents implausibly argue that each of the many cases in conflict with the Eleventh Circuit are strictly limited to their facts, or that the courts on the other side of the conflict are "confused about subcontracting" in international trade. Resp. Supp. Br. 3-4, 6 n.8. The cases speak for themselves and set forth clear legal rules contrary to the rule adopted below, and petitioner will not here repeat the analysis already set forth in the briefs explaining those conflicts. Pet. 14-29; Reply Br. 2-5, 8-10; U.S. Br. 7-9.

But this Court should be clear that neither the Government nor petitioner asks this Court to "override the contractual decision by Kirby and ICC" to have ICC "serve as 'principal' in the transaction," Resp. Supp. Br. 1. Neither the Government nor petitioner has ever disputed – because the ICC bill of lading is plain on its face – that as a matter of contract ICC "assume[d] liability for the performance of the multimodal transport contract as a carrier." Pet. App. 54a. But that is true of all nonvessel carriers that assume responsibility for the goods and contract with actual vessel carriers to transport them. As the Government notes, the settled law prior to the decision below was that the primary carrier (regardless of the duties it assumes vis-à-vis the cargo owner) is deemed in law to act as an agent for the cargo owner in placing the cargo with secondary carriers. U.S. Br. 7; Reply Br. 2-5; *Chi., Milwaukee, St. Paul & Pac. R.R.* v. *Acme Fast Freight, Inc.*, 336 U.S. 465, 487 n.27 (1949) (noting that even where the shipper contracts with a freight forwarder to carry its goods, "the shipper is the undisclosed principal of its agent, the forwarder, in the latter's contract with the carrier"); *Nippon Fire & Marine Ins. Co.* v. *Skyway Freight Sys., Inc.*, 235 F.3d 53, 61 (2d Cir. 2000). It is telling that respondents cannot find a single case that agrees with the Eleventh Circuit.[2]

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[2] Respondents falsely accuse the Government of "gravely distort[ing] the record," Resp. Supp. Br. 2, in this and other cases when it says that

Respondents mischaracterize the Government's brief as "conced[ing] that the record here creates a poor vehicle to resolve generally applicable agency issues." Resp. Supp. Br. 3 n.3. It does no such thing. To the contrary, the Government recommends certiorari on both questions; it simply believes that it is unnecessary to reach the first question because the Eleventh Circuit's error on the second question is so patent. U.S. Br. 17-18 (noting that the Eleventh Circuit's application of complicated rules of contract construction "to override the plain terms of a Himalaya Clause is inconsistent with *Herd* and fosters harmful uncertainty in the industry"). But if the case is not resolved on this basis, the Government advises this Court that "it would be appropriate to consider petitioner's ability to enforce the liability limitation in the Hamburg Süd/ICC Bill, which is incorporated into petitioner's carriage agreement." *Id.* at 18.[3] The Government points out that under *Great Northern Railway* v. *O'Connor*, 232 U.S. 508 (1914), "when a carrier accepts goods for transport from an

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this is the rule unless the contrary is established by "the governing contract and the surrounding circumstances," U.S. Br. 7. The Government is raising the possibility that a cargo owner could theoretically contract to forbid the primary carrier from entering into contracts with downstream carriers that bind the cargo owner. But that is not the norm in freight forwarder contracting, and was certainly not the case here, given that the contracts expressly authorize the carriers to engage others to perform all or part of the contract of carriage. Pet. 6-9.

[3] It is absurd (and contrary to the record) for respondents to suggest that "Norfolk Southern did not contract with Hamburg Süd," the ocean carrier, simply because the nominal purchaser of rail services was Columbus Line USA Inc. Resp. Supp. Br. 1 n.2. The bill of lading specifically identifies Columbus Line as "the trade name used by Hamburg Südamerikanische ...." Pet. App. 68a. Respondents' complaints about the record (Supp. Br. 9) are ironic since there was never any dispute below that the Hamburg Süd bill was incorporated into Hamburg Süd's contract with petitioner. Indeed, respondents conceded below that "[t]he Hamburg Süd bill of lading may have been 'the one which [Norfolk Southern] contracted and performed under,' as the district court suggested," and instead argued only that the cargo owner could not be bound because it "was not a party to that contract." Resp. C.A. Br. 24 (alterations in original).

intermediary, the liability limitations in the carrier's terms of carriage are enforceable against the cargo owner regardless of whether the intermediary contracted with the carrier 'as agent [of the cargo owner] or Forwarder.'" U.S. Br. 18 (alteration in original) (quoting 232 U.S. at 514). This Court's precedent is controlling on the first question presented, the Government argues, without any final determination of the circumstances in which nonvessel carrier is an agent or principal, which in its view as a general matter implicates analysis of the Shipping Act. *Id.* at 19-20. Thus, contrary to respondents claims, the Government believes all "the conflicts are presented in this case," *id.* at 11, and this case is the proper vehicle to resolve them.[4]

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[4] Petitioner agrees with the Government that this case can be resolved on the basis of *Great Northern* without any resort to analysis of the Shipping Act (which is not directly at issue). But, to the extent the Shipping Act would be considered, this Court should be clear that there is no uncertainty whatever in the record below as to whether ICC meets the substantive definition in the Shipping Act of a "non-vessel operating common carrier" (or NVOCC) as "a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier." 46 U.S.C. app. § 1702(17)(B). It is undisputed that ICC "assume[d] responsibility for the transportation from the port or point of receipt to the port or point of destination," *id.* § 1702(6)(A) (definition of common carrier); the bill of lading ICC issued expressly provides that it "undertakes to perform and/or in his own name to procure the performance of the entire transport from, the place at which the goods are taken in charge ... to the place of delivery," and assumed "responsibility ... for the goods ... from the time the Freight Forwarder has taken the goods in his charge to the time of their delivery." Pet. App. 55a-56a (FBL ¶¶ 2.1(a), 6.1). It is also undisputed that ICC did not operate the vessel performing the transportation; its bill of lading expressly designates Hamburg-Süd's Queensland Star as the ocean vessel. Pet. 6. Finally, it is undisputed that ICC itself was the "shipper in its relationship with an ocean common carrier," 46 U.S.C. app. § 1702(17)(B), for it was expressly named as the "'shipper/exporter'" on the Hamburg Süd bill. Pet. 8; Pet. App. 9a. Petitioner never contested that ICC was substantively an NVOCC; it argued instead that respondents could not claim such status for ICC since ICC was not licensed as an NVOCC, an argument rejected below and now abandoned by petitioner. Reply Br. 5

3. The Federal Maritime Commission, the Maritime Administration, and the Surface Transportation Board have all come forward to urge review because the decision below, and the conflicts it engenders, "create serious practical problems for shippers and carriers," who cannot contract around the decision. U.S. Br. 9, 14-15. Respondents cavalierly assert that all inland carriers should demand indemnity from ocean carriers, but that begs the question why this Court should allow the aberrant ruling below to force a sea change in commercial relationships that does nothing but preserve an unjustified windfall for marine insurance companies. Pet. 22. Furthermore, not all inland carriers (such as small truckers) have the leverage to demand indemnity from ocean carriers, and, even if they did, that would simply shift the risk of judgments exceeding the $500 per-package liability limitation to ocean carriers, which would subvert the entire purpose of COGSA. As the Government recognizes, "[i]f contract limitations on carrier liability were not enforceable against cargo owners, then the availability of reduced transport rates as a *quid pro quo* for limited carrier liability would be put at risk." U.S. Br. 19. This Court should grant review of an unprecedented decision that undermines settled law, commercial expectations, and federal policy.

CONCLUSION

The petition for writ of certiorari should be granted.

n.4. Respondents by contrast *affirmatively* claimed that NVOCC was simply the name that "Congress has preferred" to describe freight forwarders like ICC. Resp. C.A. Br. 6. Indeed, respondents claimed that cases dealing with NVOCCs were "dispositive" of this case, *id.* at 29. *See id.* at 27 (arguing that *Hale Container Line, Inc.* v. *Houston Sea Packing Co.*, 137 F.3d 1455 (11th Cir. 1998) applied because there "an NVOCC (much like ICC Ltd.) issued a bill of lading with a Himalaya clause covering its agents, servants, and independent contractors"); *id.* at 42 (arguing that *Prebena Wire Bending Mach. Co.* v. *Transit Worldwide Corp.*, 1999 AMC 2623 (S.D.N.Y. 1999) applied because there a "shipper (much like Kirby) contracted with an NVOCC (much like ICC Ltd.), which in turn contracted with an ocean carrier (much like Hamburg Süd)").

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In the Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY, PETITIONER

v.

JAMES N. KIRBY, PTY LTD., DBA KIRBY ENGINEERING, AND ALLIANZ AUSTRALIA LIMITED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether a foreign cargo owner who shipped goods to an inland destination in the United States using a shipping intermediary is bound by liability limitations in the intermediary's bill of lading, or those in the bill of lading that a subcontracting ocean carrier issued to the intermediary, when suing a railroad that subcontracted with the ocean carrier to deliver the goods to their destination.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. Petitioner seeks review of a decision of the United States Court of Appeals for the Eleventh Circuit that allows a cargo owner to recover damages from a railroad without being limited by either the cap on carrier liability in the bill of lading to which the cargo owner agreed, or the similar cap incorporated into the railroad's contract for transport. This case presents legal questions that divide the courts of appeals. Furthermore, practical realities prevent satisfactory contractual solutions to that legal uncertainty. This Court's review therefore is warranted.

STATEMENT

1. A bill of lading is a contractual document recording that a carrier has received certain goods from a shipper and "govern[ing] the relationship of the parties before delivery of the goods." 2 Thomas J. Schoenbaum, *Admiralty & Maritime Law* 60 (3d ed. 2001). Since the 19th Century, it has been "prevalent practice for [maritime] common carriers

to insert clauses in bills of lading exempting themselves from liability for damage or loss, limiting the period in which plaintiffs had to present their notice of claim or bring suit, and capping any damages awards per package." *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 534-525 (1995). Historically, however, such clauses were not uniformly enforceable in all nations. See Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 142-143 (2d ed. 1975); 2 Thomas J. Schoenbaum, *supra*, at 75. The result was a "distressing lack of uniformity in shipping practice and law," which prompted efforts to establish "uniform international regulation of the rights and duties of carriers of ocean cargo." *Ibid.*

Those efforts led to the Hague Rules of 1921, which were adopted with minor modifications by international convention in 1924. See International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931. In 1936, Congress implemented the Hague Rules by enacting the Carriage of Goods by Sea Act (COGSA), ch. 229, 49 Stat. 1207 (46 U.S.C. App. 1300 *et seq.*). See generally *Vimar Seguros*, 515 U.S. at 536-537; Grant Gilmore & Charles L. Black, Jr., *supra*, at 143-144.

COGSA governs "[e]very bill of lading * * * for the carriage of goods by sea to or from ports of the United States, in foreign trade[.]" 46 U.S.C. App. 1300. It guarantees shippers rights against common carriers and establishes the carriers' minimum liability to shippers for cargo damage or loss. See 46 U.S.C. App. 1302-1304. Of particular relevance here, COGSA establishes a default rule that limits carrier liability "for any loss or damage to or in connection with the transportation of goods" to no more than $500 per package, "unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading." 46 U.S.C. App. 1304(5). COGSA permits the carrier and shipper to agree to a higher liability cap, but not a lower one. 46 U.S.C. App. 1304(5). In practice,

bills of lading usually incorporate COGSA's $500-per-package liability limitation. Shippers pay a reduced transport rate that reflects the carriers' reduced risk and obtain private insurance for the excess value of their goods. See Michael F. Sturley, *Carriage of Goods by Sea*, 31 J. Mar. L. & Com. 241, 244 (2000); Ass'n of Am. R.R. Br. 10-11.

COGSA regulates the carriage of goods "from the time when the goods are loaded on to the time when they are discharged from the ship." 46 U.S.C. App. 1301(e). But COGSA permits the carrier and shipper to agree to terms concerning the carrier's liability for loss or damage before or after that time. See 46 U.S.C. App. 1307. Under that authority, carriers and shippers routinely extend the applicability of COGSA's provisions by contract. A so-called "Clause Paramount" in a bill of lading extends COGSA's liability rules beyond the time during which the goods are on the ship. A "Himalaya Clause" extends the benefit of COGSA's liability limitation (or other liability limitations enjoyed by the carrier) to parties other than the carrier itself. See Pet. App. 5a. The vast majority of modern maritime bills of lading include a Himalaya Clause. See Marva Jo Wyatt, *Contract Terms in Intermodal Transport: COGSA Comes Ashore*, 16 Tul. Mar. L.J. 177, 180 (1991) ("The Himalaya Clause, or some similar provision extending the carrier's rights and immunities to third parties, is now standard fare in bills of lading.").

2. a. Respondent James N. Kirby Pty Limited (Kirby) contracted with International Cargo Control Pty Ltd. (ICC) for "through" (*i.e.*, end-to-end) transportation of machinery, valued at more than $2 million, from Sydney, Australia, to Huntsville, Alabama. Pet. App. 2a, 3a, 27a; Br. in Opp. 4. ICC issued Kirby a bill of lading that designates Sydney as the place where ICC received the goods and the port of loading; Savannah, Georgia, as the port of discharge from the ship; and Huntsville (a city more than 300 miles inland from Savannah) as the place of delivery. Pet. App. 66a.

The ICC/Kirby bill limits ICC's liability under COGSA to $500 per package and otherwise caps ICC's liability for loss or damage to the goods. See Pet. App. 67a, Cl. 8.1 through 8.9 (reprinted at Pet. App. 57a-58a); see also Pet. App. 5a; Pet. 7; Br. in Opp. 4. The bill also contains a Himalaya Clause that extends the benefits of the bill's limitations on carrier liability to entities other than ICC itself. Pet. App. 3a; see *id.* at 67a, Cl. 10.1. To obtain additional protection against loss or damage to its machinery, Kirby insured the cargo with the predecessor of respondent Allianz Australia Limited. See *id.* at 4a n.4; Br. in Opp. 5 n.4.

b. An ocean shipping company known as Hamburg Sud subcontracted with ICC to transport Kirby's machinery from Sydney to Huntsville. Pet. App. 3a-4a. Hamburg Sud issued ICC a bill of lading for the cargo. See *id.* at 68a; see also *id.* at 61a-64a (excerpts from Hamburg Sud bill). The bill committed Hamburg Sud to "provide transportation to/from sea terminal and [specified] inland points, which may well involve transport by rail," *id.* at 61a, Cl. 4. The bill incorporates COGSA's $500-per-package limitation, *id.* at 63a-64a, Cl. 17, and contains a Clause Paramount, *id.* at 62a, Cl. 4.d.

The Hamburg Sud/ICC bill also includes a Himalaya Clause extending Hamburg Sud's contractual protections to other parties. That clause allowed Hamburg Sud to "subcontract on any terms the whole or any part of the carriage" of Kirby's cargo, Pet. App. 62a, Cl. 5.a, and states that "all exemptions, limitations of, and exonerations from liability" provided under the Hamburg Sud/ICC bill "shall be available to" Hamburg Sud's agents and subcontracting parties, including "all participating (including inland) carriers." *Id.* at 63a, Cl. 5.b.

c. Hamburg Sud's ship carried Kirby's machinery from Sydney to Savannah, where Hamburg Sud (or a subsidiary of Hamburg Sud) hired petitioner to carry the cargo by rail to Huntsville. Pet. App. 4a & n.3. Petitioner carried the cargo under a contract that incorporated the terms of the bill of

lading that Hamburg Sud had issued to ICC. *Id.* at 4a. Petitioner's train derailed between Savannah and Huntsville, damaging Kirby's machinery. Kirby recovered from its insurer/co-respondent for the loss. *Id.* at 4a n.4.

3. Respondents sued petitioner in the United States District Court for the District of Georgia, alleging breach of contract and tortious negligence and recklessness, among other claims. Pet. App. 4a; see C.A. E.R. Tab 24, paras. 14-24, 31-35 (Second Amended Complaint). Petitioner raised as a defense the $500-per-package limitation contained in the Hamburg Sud/ICC bill, which, petitioner argued, protected it as a subcontractor of Hamburg Sud. See Pet. App. 29a, 31a-32a.

The district court determined that respondents' claims against petitioner are subject to the liability limitation in the Hamburg Sud/ICC bill of lading, because that was the contract under which petitioner "contracted and performed." Pet. App. 37a. The Hamburg Sud/ICC bill, the court further concluded, unambiguously extends its $500-per-package limitation to an inland carrier providing transport to Huntsville. *Ibid.* Accordingly, the district court determined that petitioner's liability is limited to $500 for each of ten "packages" of machinery, or $5000. *Id.* at 38a.

The district court certified its decision for immediate appeal under 28 U.S.C. 1292(b). See Pet. App. 21a-26a.

4. The United States Court of Appeals for the Eleventh Circuit reversed. Pet. App. 1a-20a. The court of appeals first expressed the view that the inland-carrier liability limitation in the Hamburg Sud/ICC bill is binding on Kirby only if ICC was "acting as Kirby's agent when it entered the shipping contract with Hamburg Sud." *Id.* at 6a. Thus, the court stated, whether ICC was acting as Kirby's agent when it received Hamburg Sud's bill is "the pivotal question." *Id.* at 7a.

Turning to that question, the court determined that ICC did not act as Kirby's agent when it contracted with Hamburg Sud, and, therefore, ICC could not have limited Kirby's

recovery from petitioner by accepting Hamburg Sud's bill of lading. Pet. App. 7a-11a. The court reasoned that if ICC had acted as Kirby's agent, then Hamburg Sud's bill of lading would list Kirby as the shipper, whereas the bill actually lists ICC as the shipper. *Id.* at 7a-8a, 9a. Similarly, the court said, Kirby would not have contracted with ICC for through transport, if ICC was Kirby's agent. *Id.* at 8a. The court noted that the ICC/Kirby bill of lading is based on standard terms that are intended for use by shipping intermediaries when they operate as carriers with respect to shippers. *Id.* at 8a-9a. Finally, the court stated that "absent special particular arrangements" establishing an agency relationship, an intermediary that arranges for the carriage of cargo "is considered as an independent contractor" that cannot contractually bind the shipper. *Id.* at 9a (quoting *Naviera Neptune S.A.* v. *All Int'l Freight Forwarders, Inc.*, 709 F.2d 663, 665 (11th Cir. 1983)). The court of appeals therefore concluded that Kirby is not bound by the provisions of the ICC/Hamburg Sud bill of lading, and petitioner cannot invoke the liability limitations in that bill against Kirby. *Id.* at 10a-11a.

The court of appeals next determined that petitioner is not protected by the liability limitation in the ICC/Kirby bill of lading because the Himalaya Clause in that bill "does not specifically identify [petitioner] as a member of a well-defined class of its beneficiaries." Pet. App. 11a; see *id.* at 11a-13a. The court stated that when a Himalaya Clause does not specifically describe a party, the Eleventh Circuit denies that party protection unless there is "privity between the carrier and the party seeking shelter in the Himalaya clause." *Id.* at 14a; see *id.* at 14a n.11.

Judge Siler dissented. In his view, ICC was acting as an agent of Kirby in contracting with Hamburg Sud. Pet. App. 19a. Judge Siler further stated that because it was clear that inland carriers would be used to transport Kirby's machinery, the absence of a specific reference to inland carriers in the Himalaya Clause of the ICC/Kirby bill does not prevent

petitioner from invoking the protection of that clause. *Id.* at 19a-20a. Judge Siler also concluded that because the Hamburg Sud/ICC bill covers transportation from Sydney all the way to Huntsville, it likewise is binding on Kirby and protects petitioner. *Id.* at 20a.

DISCUSSION

The shipment of goods in this case is representative of a large number of international, multimodal transactions for which uniform rules of law are essential.[1] The courts of appeals presently disagree about the background rules of federal law that should be applied to contractual arrangements like those at issue in this case. Although the case presents significant complexities, this Court's review of the Eleventh Circuit's judgment is warranted to clarify and unify the law.

I. THE PETITION PRESENTS IMPORTANT QUESTIONS OF MARITIME LAW ON WHICH THE MAJOR MARITIME CIRCUITS ARE DIVIDED

A. Genuine Circuit Conflicts Exist

The petition identifies two relevant areas of disagreement among the major maritime circuits. The first conflict, which is the subject of Question 1 in the petition, involves the nature of the relationship that is presumed to exist between a cargo owner and a shipping intermediary (such as ICC) that does not physically transport cargo, when the governing contract and the surrounding circumstances do not clearly establish the nature of that relationship. See Pet. 14-19. The Second, Third, and Ninth Circuits presume an agency relationship in that situation. See *Kukje Hwajae Ins. Co.* v. *The M/V Hyundai Liberty*, 294 F.3d 1171, 1175-1177 (9th Cir. 2002), petition for cert. pending *sub nom. Green Fire &*

[1] Multimodal transport, also known as intermodal transport, involves transport by both water and land (or air) under a single bill of lading. See 2 Thomas J. Schoenbaum, *supra*, at 29 n.1.

Marine Ins. Co. v. *M/V Hyundai Liberty*, No. 02-813 (filed Nov. 22, 2002); *SPM Corp.* v. *M/V Ming Moon*, 22 F.3d 523, 526-527 (3d Cir. 1994); *Insurance Co. of N. Am.* v. *S/S Am. Argosy*, 732 F.2d 299, 300-301 (2d Cir. 1984).[2] In this case, the Eleventh Circuit has adopted a conflicting rule, stating that "special particular arrangements" are necessary to demonstrate that the intermediary is acting as an agent of the shipper, rather than as an independent contractor. Pet. App. 9a, 10a.

The second pertinent conflict, which is the subject of Question 2 in the petition, involves the circumstances under which a Himalaya Clause that extends liability limitations to parties other than the carrier is enforceable by third-party beneficiaries. See Pet. 23-26. The Eleventh Circuit denies Himalaya Clause protection to putative third-party beneficiaries that are not in privity of contract with the shipper or carrier, unless they are designated as beneficiaries by a specific description "such as 'stevedore,' 'terminal operator,' etc." Pet. App. 14a n.11. A general description of the third party—"such as 'agent,' 'servant,' or 'independent contractor'"—is not sufficient in the absence of privity. *Ibid.* The Fourth Circuit has suggested a similar specificity requirement when a Himalaya Clause is invoked by a non-maritime entity that provided transport under the bill of lading. See *Caterpillar Overseas, S.A.* v. *Marine Transp. Inc.*, 900 F.2d 714, 726 (4th Cir. 1990).

The Second Circuit has stated more broadly that beneficiaries of a Himalaya Clause must be in "contractual privity with the shipper or carrier." *Mikinberg* v. *Baltic S.S. Co.*, 988 F.2d 327, 333 (1993). The Third Circuit likewise has suggested that contractual privity may be required for a Himalaya Clause to apply. *SPM Corp.* v. *M/V Ming Moon*, 965 F.2d 1297, 1305 n.9 (1992).

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[2] The Court has invited the Solicitor General to file a brief in the *Green Fire* case, No. 02-813, expressing the views of the United States.

The Ninth Circuit "reject[s] [the] argument that privity of contract is required in order to benefit from a Himalaya Clause, and instead enforces such clauses when the party seeking protection has provided services that are "the carrier's responsibilities under the carriage contract." *Akiyama Corp. of Am.* v. *M.V. Hanjin Marseilles*, 162 F.3d 571, 574 (1998) (quoting *Taisho Marine & Fire Ins. Co.* v. *The Vessel Gladiolus*, 762 F.2d 1364, 1367 (9th Cir. 1985)).

B. The Conflicts Have Practical Importance

Those circuit conflicts create serious practical problems for shippers and carriers. "Carriers and cargo interests need to know who bears the risk of potential loss so that they can decide who must insure against it. Insurers need the same information to calculate their premiums." Michael F. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5): A Case Study in the Misinterpretation of the Carriage of Goods by Sea Act*, 19 J. Mar. L. & Com. 1, 21 (1988). When courts of appeals disagree, certainty is particularly difficult to achieve in international shipping. As petitioner (Pet. 3 n.1) and amicus Association of American Railroads (Br. 15-16) note, shipowners and other potential defendants (such as the major railroad that is the petitioner in this case) often could be sued in any of several judicial circuits with respect to the same transaction.

Furthermore, multimodal transport and the so-called "container revolution" have made third-party enforcement of Himalaya Clauses critically important in international ocean shipping. As the Court explained in *NLRB* v. *International Longshoremen's Association*, 447 U.S. 490 (1980), container transport involves "large, reusable metal receptacles [*i.e.*, containers], ranging in length from 20 to 40 feet * * * which can be moved on and off an ocean vessel unopened." *Id.* at 494. Cargo destined for the same location can be packed into a container and only the container—not the individual items of cargo within the container—is physically handled en route to its ultimate destination. The stan-

dardized dimensions of containers make it possible to handle and stow cargo more efficiently, so that ships carry more cargo and are loaded and unloaded in far less time than before. See *id.* at 494-496. The Maritime Administration of the Department of Transportation advises that in Fiscal Year 2002, approximately 28% (by weight) of international waterborne cargo in the United States was containerized.

One consequence of the container revolution is that the water's edge ceases to be "the critical point for the division of functions, costs, and risks." 2 Thomas J. Schoenbaum, *supra*, at 30 (3d ed. 2001). Containerized cargo moves easily and without re-packaging among ships, trains, trucks, and even airplanes. See *id.* at 29-30. In multimodal container shipments, "[t]he critical point is now the place where the container is loaded or 'stuffed.'" *Id.* at 30.

The container revolution also has lent further importance to the role of intermediaries who, in addition to making arrangements for shippers, combine the goods of various shippers into larger loads bound for the same location. Intermediaries enable cargo owners to share in the efficiencies of containerization even if their shipments to particular destinations are infrequent, or too small to fill a container. See *International Longshoremen's Ass'n*, 447 U.S. at 495-496 & n.8; 2 Thomas J. Schoenbaum, *supra*, at 30. Congress recognized the important role of shipping intermediaries in the Shipping Act of 1984, 46 U.S.C. App. 1701 *et seq.*, which requires licensing of certain intermediaries and establishes regulatory oversight of their activities by the Federal Maritime Commission. See 46 U.S.C. App. 1702(17) & 1718.

Due in part to those developments, a single "through bill of lading" commonly covers transport of a shipper's goods all the way to an inland destination. As in this case, the through bill often is issued by a shipping intermediary, which contracts for transport with a vessel-owning carrier. Accordingly, questions concerning the intermediary's authority to act for the cargo owner, and the liability of parties that subcontract with a carrier that is not in contractual privity with

the shipper, are far more likely to arise today than when port-to-port carriage of a particular shipper's goods on a particular vessel was the ordinary focus of a bill of lading.[3]

C. The Conflicts Are Presented In This Case

Despite the general importance of the questions presented in the petition, there are threshold issues—which the parties have not addressed—concerning the applicability of federal maritime law in this case and, therefore, the appropriateness of addressing those questions here.

1. The record facts do not preclude the possibility that petitioner's liability could have been determined under statutory rules governing railroad transport. The Carmack Amendment to the Interstate Commerce Act (49 U.S.C. 11706), provides that railroads generally are liable for loss or injury to property, 49 U.S.C. 11706(a), and may limit their liability only under specified circumstances, 49 U.S.C. 11706(c)(1) and (3).[4]

It is unsettled whether the Carmack Amendment applies to land transport under international, multimodal through bills of lading, such as the bills in this case. Compare *Neptune Orient Lines, Ltd.* v. *Burlington N. & Santa Fe Ry.*, 213 F.3d 1118, 1119 (9th Cir. 2000) (Carmack Amendment reaches "the inland leg of an overseas shipment conducted under a single 'through' bill of lading * * * to the extent that the shipment runs beyond the dominion of [COGSA]"), and *Berlanga* v. *Terrier Transp., Inc.*, 269 F. Supp. 2d 821, 826-830 (N.D. Tex. 2003) (motor carrier con-

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[3] We are advised by the Department of State that the ongoing international negotiations discussed by the parties (see generally Br. in Opp. 3-4, 21-22, 29-30; Pet. Reply Br. 8), the results of which would have to be implemented through domestic legislation, are not likely to resolve the issues addressed in this brief.

[4] The particular shipments at issue here are exempt from certain regulatory requirements, see 49 C.F.R. 1090.2, but such exempt freight is generally subject to the liability rules of Section 11706, see 49 U.S.C. 10502(e). The Carmack Amendment also established liability rules for motor carriers. See 49 U.S.C. 14706.

text) (same), with *Capitol Converting Equip., Inc.* v. *LEP Transp., Inc.*, 965 F.2d 391, 394 (7th Cir. 1992) (Carmack Amendment inapplicable when domestic transport is covered by international through bill of lading), and *Swift Textiles* v. *Watkins Motor Lines, Inc.*, 799 F.2d 697, 701 (11th Cir. 1986) (motor carrier context) (same), cert. denied, 480 U.S. 935 (1987); see generally *Reider* v. *Thompson*, 339 U.S. 113 (1950).

That uncertainty, however, is not material to this Court's consideration of the instant petition. First, the Carmack Amendment issue was not raised in the lower courts or in respondents' brief in opposition. Accordingly, it has been waived. See S. Ct. Rule 15.2. Second, we are advised by petitioner that the rail transport in this case was provided as contract carriage under 49 U.S.C. 10709, which would make the transport exempt from the Carmack Amendment's liability rules. See 49 U.S.C. 10709(b) and (c). Third, data maintained by the Surface Transportation Board reflect that most (approximately 56% by revenue) multimodal, containerized rail freight is transported under such contract-carriage arrangements, to which the Carmack Amendment's liability regime does not apply. In sum, even if the Carmack Amendment's liability rules sometimes apply to rail transport under international, multimodal through bills of lading, they do not apply to a large amount of the cargo carried by railroads under such bills, including, it appears, Kirby's cargo in this case.

2. There also is an unexplored issue whether the courts below were correct in assuming that this case is governed by federal substantive law. A federal rule of decision may be justified "where there is a 'significant conflict between some federal policy or interest and the use of state law.'" *O'Melveny & Meyers* v. *FDIC*, 512 U.S. 79, 87 (1994) (quoting *Wallis* v. *Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)); see *American Dredging Co.* v. *Miller*, 510 U.S. 443, 447 (1994) (state remedies must not "work[] material prejudice to the characteristic features of the general maritime

law or interfere[] with the proper harmony and uniformity of that law in its international and interstate relations") (quoting *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205, 216 (1917)). It plausibly could be argued that sufficient justification for applying general federal maritime law, rather than the state or foreign law indicated by application of Georgia's choice-of-law rules, exists in this case in light of: the international, interstate nature of the transport contemplated under the bills of lading; the parties' use of the same contract provisions to cover both maritime and land transport; the interrelationship between the bills of lading and COGSA; and the relative importance within the contract of the ocean transport from Sydney to Savannah, as compared with the land transport from Savannah to Huntsville. Cf., *e.g.*, *Wemhoener Pressen* v. *Ceres Marine Terminals, Inc.*, 5 F.3d 734, 741 (4th Cir. 1993) ("[C]ontractual extensions of COGSA are to be construed * * * without reference to state law.").

The Court need not resolve that issue, however. In seeking certification of the district court's liability determination for interlocutory appeal under 28 U.S.C. 1292(b), the parties jointly argued that the correct resolution of the liability-limitation issue turns on questions of federal law that divide the circuits. See Pet. App. 24a; see also Dist. Ct. Joint Mot. to Certify Partial Summ. J. for Immediate Permissive Review 4-7. In the court of appeals, respondents stated that the liability issue "must be determined" by applying principles of maritime law derived from *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959). Resp. C.A. Br. 15; see also *id.* at 46 (arguing that this case implicates "competing lines of jurisprudence arising under [COGSA]."). Respondents thus have accepted petitioner's contention that this case involves "questions of federal maritime law." Pet. 2. Because this is a diversity action under 28 U.S.C. 1332(a)(2) and the question of what law applies is not jurisdictional, this Court may rely on the parties' joint position and address the federal-law questions decided by the Eleventh Circuit and presented in the petition.

D. Carriers And Shippers Do Not Have Viable Means Of Contracting Around The Court Of Appeals' Decision

The result of the Eleventh Circuit's decision is that respondents are able to recover from petitioner without being limited by the COGSA-based cap on liability, even though both bills of lading in this case covered the inland transport during which the damage to Kirby's machinery occurred and contained a $500-per-package liability limitation.

Respondents address the anomaly of that result by suggesting (Br. in Opp. 21) that inland carriers can protect themselves from similar liability by: (1) declining to participate in multimodal transactions; (2) negotiating liability limits directly with cargo owners; or (3) seeking indemnity provisions in their agreements with other carriers. Respondents' first proposal is unworkable on its face. The Department of Transportation advises that multimodal containerized freight comprises approximately ten percent of all rail freight. A major railroad (or trucking line) could not refuse to participate in international multimodal transport and remain viable in the competitive transportation industry. Furthermore, the public interest weighs strongly against rules of law that discourage inland carriers from participating in efficient, lower-cost arrangements for international transport. See *Pennsylvania* v. *ICC*, 561 F.2d 278, 282 (D.C. Cir. 1977) (discussing benefits of "joint through rate tariffs" for ocean and rail transport).

Nor is it feasible for subcontracting carriers to negotiate directly with cargo owners. A single bill of lading often covers multiple containers, each of which may hold goods owned by multiple parties, who may reside in other nations. See generally Ass'n of Am. R.R. Br. 8-9, 13; cf. *Stolt Tank Containers, Inc.* v. *Evergreen Marine Corp.*, 962 F.2d 276, 279 (2d Cir. 1992) (requiring carriers to negotiate with all parties who have an interest in cargo "would impose far

too heavy a burden" and "undermine COGSA's purpose" of creating predictable liability rules) (internal quotation marks omitted).

Indemnity agreements also are not a satisfactory mechanism for providing certainty to subcontracting carriers. The actual value of the goods—and hence the risk associated with an indemnification arrangement—may be known only to the cargo owner(s). Without knowledge of the actual value of the goods, it may be impossible to establish satisfactory indemnification arrangements. Furthermore, the industry practice of setting carriers' liability at COGSA's minimum amount of $500 per package suggests that it is less costly for shippers to insure themselves against losses than for carriers to bear the risk or insure against it. In this case, for example, Kirby obtained insurance to supplement the protection afforded under ICC's bill of lading. It would have been grossly inefficient for petitioner to negotiate with Hamburg Sud for overlapping protection against the same loss.[5]

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[5] Conceivably, the liability issue in this case could have been addressed by a "circular indemnification" arrangement. Under that approach, Kirby would have agreed to indemnify ICC for its losses (in excess of the contractual liability cap) if Kirby recovered in a suit arising from the transport; ICC similarly would have agreed to indemnify Hamburg Sud if Kirby recovered; and Hamburg Sud would have agreed to indemnify petitioner if Kirby recovered. That string of contractual arrangements might have prevented Kirby from suing petitioner, because its potential liability to ICC would offset its potential recovery from petitioner. Such provisions generally have not been adopted by United States carriers, however, and the full chain of indemnifications seemingly would have to be negotiated by the parties (or expected as an industry-standard arrangement) before petitioner could agree to provide transport at a particular rate. Circular indemnification would be a cumbersome way of precluding damages recovery that, as we explain below, should be unavailable in any event.

II. THE DECISION BELOW IS INCORRECT

A. The Result Below Is Incorrect In Light Of Kirby's Acceptance Of A Liability Limitation Under The ICC/Kirby Bill Of Lading

1. Kirby's contract with ICC clearly extended the $500-per-package liability limitation to the inland transport of Kirby's goods from Savannah to Huntsville. The ICC/Kirby bill provides that ICC would "perform and/or * * * procure" multimodal transport to Huntsville, Pet. App. 67a (Cl. 2.1(a) and definition of "Freight Forwarder"), and that the bill's liability limitations "apply whenever claims relating to the performance of the contract * * * are made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract," *id.* at 67a, Cl. 10.1; see *id.* at 67a, Cl. 10.2 (beneficiaries of Himalaya Clause are deemed parties to the contract). The bill specified an inland place of delivery, *id.* at 66a, and expressly states that Kirby's goods might be transported in separate "stage[s]," *id.* at 67a, Cl. 8.6.a.[6]

If ICC had contracted directly with petitioner for rail transport, there would be little question in the Eleventh Circuit that petitioner could enforce the $500-per-package limitation in the ICC/Kirby bill against Kirby despite its lack of contractual privity with Kirby. See Pet. App. 12a-13a. The result should not be different because ICC instead contracted with Hamburg Sud, which contracted with petitioner. Both ICC's contract with Hamburg Sud and Hamburg Sud's ensuing subcontract with petitioner were anticipated in the ICC/Kirby bill and foreseeable by Kirby.

[6] Petitioner argued in the court of appeals that the relevant bill of lading in this case is the Hamburg Sud/ICC bill, but it preserved the argument, fully addressed by the court of appeals, that the Himalaya Clause of the ICC/Kirby bill applies. See Pet. C.A. Br. 32 ("Kirby cannot allege to have a surviving claim whether in contract or tort, arising out of a portion of the performance of the ICC Ltd. bill of lading[,] after explicitly agreeing by that contract's terms that its damages would be limited to $500.00 per package."). Furthermore, respondents argued in the district court that the ICC/Kirby bill is the relevant contract. See Pet. App. 37a.

2. The court of appeals reasoned (Pet. App. 11a-18a) that, under this Court's decision in *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, *supra*, the failure of the ICC/Kirby Himalaya Clause to make specific mention of inland carriers prevents petitioner from obtaining protection under that clause. The Eleventh Circuit has misapplied *Herd*.

In *Herd*, the applicable bill of lading incorporated COGSA's $500-per-package limitation, but only as to the carrier itself. A stevedoring company hired by the ocean carrier dropped a portion of the cargo into the water during the loading process. The cargo owner sued the stevedoring company in tort. The stevedoring company invoked the $500-per-package liability limitation in COGSA, as well as the parallel limitation in the bill of lading. See 359 U.S. at 298-299.

This Court determined that the stevedoring company was not protected under COGSA or the bill of lading because both addressed only the carrier's liability. 359 U.S. at 301-308. In pertinent part, the Court stated that there was "nothing in [the bill of lading] to indicate that the contracting parties intended to limit the liability of stevedores or other agents of the carrier for damages caused by their negligence." *Id.* at 302. The Court refused to infer such an extension of the liability limitation in the absence of clear contract language, because such an inference would be contrary to common-law liability rules. *Id.* at 303-305.

Under *Herd*, the carrier's contractual protections do not automatically extend to subcontractors of the carrier. Furthermore, Himalaya Clauses should not be construed to protect third-party beneficiaries "unless the clarity of the language used expresses such to be the understanding of the contracting parties." 359 U.S. at 305 (citation and internal quotation marks omitted). Applying those rules to this case,

the dispositive fact is that clear language in the ICC/Kirby bill extends the protection of the $500-per-package limitation to petitioner as a subcontractor of ICC's chosen ocean carrier. Petitioner is expressly protected under Clause 10.1 as an "independent contractor * * * whose services have been used in order to perform the contract." Pet. App. 67a.

The court of appeals found significance in the fact that petitioner is a railroad, rather than a provider of port services. Pet. App. 15a-17a; accord *Caterpillar Overseas*, 900 F.2d at 726. When a shipper contracts in a single through bill for transport by both sea and land, however, there is no basis for applying a complicated rule of contract enforcement that distinguishes between providers of port services and other providers whose services are equally foreseeable and essential to fulfillment of the contract. Using such a rule to override the plain terms of a Himalaya Clause is inconsistent with *Herd* and fosters harmful uncer tainty in the industry.

B. The Liability Limitation In The Hamburg Sud/ICC Bill May Provide Alternative Grounds For Resolving The Case

If the petition is granted and the case is not resolved on the basis of the ICC/Kirby Himalaya Clause, then it would be appropriate to consider petitioner's ability to enforce the liability limitation in the Hamburg Sud/ICC bill, which is incorporated into petitioner's carriage agreement.

1. This Court's decision in *Great Northern Railway Co.* v. *O'Connor*, 232 U.S. 508 (1914), suggests that, when a carrier accepts goods for transport from an intermediary, the liability limitations in the carrier's terms of carriage are enforceable against the cargo owner regardless of whether the intermediary contracted with the carrier "as agent [of the cargo owner] or Forwarder." *Id.* at 514. Such a rule would be consistent with the common law's allowance of "fair, open, just and reasonable agreement[s]" under which shippers obtain lower rates in exchange for limiting carrier

liability, *Adams Express Co.* v. *Croninger*, 226 U.S. 491, 509 (1913), and harmonious with the rule that tariff limitations on railroad liability are conclusive, see, *e.g.*, *Feinberg* v. *Railway Express Agency*, 163 F.2d 998, 999 (7th Cir. 1947) (railroad's receipt for mink coat "was binding on it as to the charge it could make and on the [owner] as to the amount she could collect in case of loss"), cert. denied, 332 U.S. 847 (1948). If contract limitations on carrier liability were not enforceable against cargo owners, then the availability of reduced transport rates as a *quid pro quo* for limited carrier liability would be put at risk.

Furthermore, as the Second Circuit explained when discussing potential tort liability in a case involving air cargo, carriers who accept goods from intermediaries generally are "entitled * * * to assume" that the intermediary has authority to accept the terms of carriage, and "[f]rom the perspective of the [carrier, the cargo owner] is an unforeseeable plaintiff." *Nippon Fire & Marine Ins. Co.* v. *Skyway Freight Sys., Inc.*, 235 F.3d 53, 62 n.4 (2d Cir. 2000). It would not be reasonable to expect petitioner to review ICC's contract with Kirby to assess its own potential liability to Kirby. Rather, petitioner could justifiably rely on the protections it negotiated with the party (Hamburg Sud or a subsidiary thereof) that presented the goods for shipment by rail.

2. For the reasons given above, it would not be necessary for the Court to reach the agency question framed in the petition (see Pet. 14-23) in order to resolve the case on the merits. If the Court does address that issue, however, its analysis should consider the Shipping Act of 1984, 46 U.S.C. App. 1701 *et seq.* Codifying the regulatory approach of the former Federal Maritime Board (the predecessor to the Federal Maritime Commission), see *Common Carriers by Water—Status of Express Cos., Truck Lines, and Other Non-Vessel Carriers*, 6 F.M.B. 245 (1961); *Bernhard Ulmann Co.* v. *Porto Rican Express Co.*, 3 F.M.B. 771 (1952), the Shipping Act provides that maritime businesses may be common carriers, regulated as such, even if they do not own

or operate any ships. The Shipping Act creates the statutory classification of "ocean transportation intermediary," which includes both "ocean freight forwarders" and "non-vessel-operating common carriers" (NVOCCs). Ocean freight forwarders arrange for shipments from the United States via common carrier "on behalf of shippers." 46 U.S.C. App. 1702(17)(A). Implementing regulations of the Federal Maritime Commission provide that if an ocean freight forwarder is identified in the bill of lading as a shipper, its agency relationship with the original shipper must be indicated as well. 46 C.F.R. 515.42(a). The Shipping Act further provides that NVOCCs operate and are regulated as common carriers, but NVOCCs do not own the vessels used for transport and they are defined as shippers in their relationships with vessel-operating common carriers. See 46 U.S.C. App. 1702(6) and (17)(B).

ICC's status as an NVOCC *vel non* therefore may bear on the agency issue discussed in the petition. Cf. *Chicago, Milwaukee, St. Paul & Pac. R.R.* v. *Acme Fast Freight, Inc.*, 336 U.S. 465 (1949) (discussing role of freight forwarders under Interstate Commerce Act). Yet the parties seem to agree that the record facts do not conclusively establish whether ICC was acting as an NVOCC. See Br. in Opp. 16; Pet. Reply Br. 5-6 n.4; see also Pet. App. 10a n.9. That factual uncertainty is an additional reason why the agency issue may prove to be an unsuitable ground for resolving the case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 02-1028

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY PTY LTD D/B/A KIRBY ENGINEERING,
MMI GENERAL INSURANCE LTD.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. In matters of significant interest to its members, AAR frequently

[1] The parties have filed with the Court letters consenting to the filing of *amicus* briefs. No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

appears before Congress, administrative agencies and the courts on behalf of the railroad industry. For AAR's member railroads that are active participants in international commerce, the significance of this case goes well beyond the $1.5 million in damages sought against petitioner.

As petitioner aptly put, the decision of the Eleventh Circuit "upsets settled expectations and business practices." Pet. at 20. This observation rings particularly true for railroads that handle large volumes of freight arriving from overseas, accounting for a significant share of their business. This business is conducted in accordance with established commercial practices designed to assure that goods move reliably, services are paid for, and the terms of the carriage are well understood. Under the Eleventh Circuit's decision, these settled practices will no longer protect railroads participating in international commerce from unpredictable liability. The decision below thus strikes a blow against uniformity and certainty in an area where predictability of liability risk is critical, and will lead to inefficiency as railroads and other participants in intermodal international transportation are forced to accommodate an unworkable legal rule. AAR files this brief to emphasize to the Court the significance of the impact of this "upsetting" on the railroad industry and the urgency of the need for this Court to clarify the legal rules under which international commerce takes place.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case of petitioner.

SUMMARY OF THE ARGUMENT

The decision below regarding the applicability and interpretation of bills of lading utilized in international commerce will have a significant impact on railroads. Railroads actively participate in international commerce, moving substantial amounts of cargo arriving from overseas

by ocean carrier, primarily in containers, to final destination points in the United States. As a practical matter, railroads rarely do business directly with the overseas shippers of the cargo. Rather, they enter into arrangements with U.S. based freight forwarders or with ocean carriers, often agreeing to ship large volumes of freight tendered by these parties. Like other carriers, railroads establish contractual liability limitations, often those established by the Carriage of Goods by Sea Act, which they typically require to be passed back to downstream parties.

The COGSA liability provisions, which were set forth in two bills of lading interpreted by the court below, establish a regime by which an ocean carrier's liability for damage to the lading is limited. These limits, which may be contractually extended to other carriers, allow carriers to offer low rates to shippers, who in turn obtain insurance to cover any excess risk. The court below interpreted the bills of lading, which clearly were meant to extend COGSA limitations, as not benefitting petitioner railroad, even though petitioner was an anticipated and indispensable party to the transportation required by the shipper. This ruling, which creates a windfall for the shipper's insurer, is based on notions of agency and privity which do not comport with commercial realities and are in conflict with decisions of other courts of appeals. If it is allowed to stand, railroads will need to alter their practices in ways that are neither efficient nor practical, with the consequence of upsetting established commercial norms in international shipping.

ARGUMENT

I. RAILROADS PARTICIPATE IN A SIGNIFICANT AMOUNT OF INTERNATIONAL INTERMODAL BUSINESS WHICH IS CONDUCTED IN ACCORDANCE WITH WELL-ESTABLISHED AND EFFICIENT BUSINESS PRACTICES

The Eleventh Circuit has torpedoed the expectations of U.S. rail carriers in a decision that, though grappling with seemingly mundane questions–which bill of lading applied and to whom did it apply[2]–has significant ramifications for international commerce. Creating technical rules with no policy justification and elevating such technicalities over the clear intent of freely entered into contracts, the Eleventh Circuit has muddled an area that demands clarity and uniformity.

As is typical, the international transportation shipment giving rise to this case involved multiple parties. Here, respondent Kirby, the cargo owner who shipped the goods from Sydney, Australia, sued petitioner, the railroad responsible for the inland portion of the move to its final destination, Huntsville, Alabama, for damage to the cargo occurring during the inland move. Federal statute establishes limits on liability when a lading is damaged during transportation by ocean carrier. Carriage of Goods by Sea Act (COGSA), ch. 229, 49 Stat. 1207 (1936), codified at 46 U.S.C. app. §§1300-1315. Absent declaration of a higher value for the cargo, liability is limited to $500 per package, 46 U.S.C. app. §1304(5), a limitation which, by contract, may be extended to other parties participating in the

[2] A bill of lading is a document evidencing receipt of goods for shipment issued by persons engaged in the business of transporting or forwarding goods, which contains, among other things, the contract for carriage of the goods. BLACK'S LAW DICTIONARY 168 (6th ed. 1990).

transportation. *Id.* at §1307. Liability limitations, and the scope of their applicability, are generally set forth in the bill of lading.[3]

In this case, two bills of lading issued in the course of the underlying transaction expressed an intent to extend COGSA's limitations on liability to all carriers performing the transportation contract. Yet, according to the court, petitioner may not avail itself of the benefits of either. Ensnaring petitioner in a variation of a classic "Catch 22," the court held that the bill of lading which protected petitioner did not bind Kirby, and that the bill of lading that bound Kirby did not protect petitioner. *Kirby v. Norfolk Southern Ry. Co.*, 300 F.3d 1300 (11th Cir. 2002). The court acknowledged that the Himalaya clause of the bill of lading issued by the ocean carrier to the freight forwarder hired by Kirby was meant to benefit the railroad, as it referenced "inland carriers" as among the parties against whom liability was limited. However, the court held that this bill of lading did not bind Kirby because the freight forwarder who contracted to ship Kirby's freight did not act as an agent. *Id.* at 1305-07. At the same time, the court also held that while the Himalaya clause of the bill of lading issued by the freight forwarded to Kirby did bind Kirby, its extension to "any independent contractor whose services have been used in order to perform the contract" did not benefit petitioner. Though, undisputably, petitioner did provide "services used to perform the contract" the court reasoned that petitioner was not covered by that phrase because it did not contract (was not in privity) with the carrier (freight forwarder). *Id.* at 1308-10. In addition to dealing a double blow to petitioner,

[3] Contractual extensions of COGSA's liability limitations to cover parties participating in the shipment prior or subsequent to the ocean carriage are known as Himalaya clauses. *Generali v. D'Amico*, 766 F.2d 485, 487-88 (11th Cir. 1985).

the court below also struck a blow against the reliance interests of rail carriers and other parties engaged in international transportation.

A. Railroads are Significant Participants in International Commerce

Transportation is the life blood of commerce. "Intermodal" freight transportation–movements involving two or more modes of transportation–has been a growing force in world markets over the past few decades and plays a vital role in the global economy. *See generally,* GERHARDT MULLER, INTERMODAL FREIGHT TRANSPORTATION (3d ed. 1995). Intermodal transportation involving the interchange of freight shipped in containers or trailers has experienced explosive growth since the 1950s. DAVID J. DEBOER, PIGGYBACK AND CONTAINERS 159 (1992). Containers predominate in international moves, and millions of containers, accounting for billions of dollars in transportation revenue, are transported from overseas to the points in the United States each year.

Railroads began prominent use of containers in the 1920s, while containerization of ocean cargo became widespread in the late 1950s. MULLER at 12-13. During the 1960s, land and sea container transportation evolved from separate services to a combined, integrated service. *Id.* at 17. Marrying up of sea and land transport often is an effective way of shortening delivery time of international freight movements, as it permits avoidance of circuitous and lengthy ocean routes. So-called "bridge" service may involve ocean carriage from Asia to a U.S. west coast port, and from the east coast to Europe, linked by transcontinental land-based transportation. *Id.* at 104 Even where the final destination is a U.S. port and an all-water route is feasible, efficiency may call for the final leg of the move by land. *Id.* at 106-107. Finally, international moves to inland U.S. destinations must of necessity involve a land-based carrier.

Railroads are active participants in international trade and a vital link in the global economy, serving all the major ports ringing the U.S. coast line from Boston to Seattle-Tacoma. Connecting these ports to numerous inland locations, railroads play a key role in the movement of international freight, originating much export traffic, and serving as intermediary or destination carriers for large volumes of import traffic. Railroads derive approximately $3 billion in annual revenue moving import traffic in several million containers.

Intermodal traffic is a growing and highly competitive segment of the rail market. Although some export traffic moves in containers, commonly exported bulk products, such as coal and grain, move to port in open hopper cars. The size and weight of these shipments makes them particularly suited for rail transport. On the other hand, import shipments, which typically consist of high-value items such as consumer goods, electronics, household products and clothes, move primarily in containers that are loaded off of ships at port and onto flatcars designed to carry containers. Such shipments often are transported in dedicated fast trains. Before reaching final destination, such traffic may be interchanged with another railroad or mode (*e.g.*, truck).

The growth of intermodal traffic, both domestic and international, has spawned a number of associated industries. On the manufacturing side, companies worldwide produce the large volumes of containers needed to sustain international shipping. MULLER at 164-73. Cranes and other heavy equipment used for loading and unloading also are in continual demand. *Id.* at 147-56. On the service side, over the past few decades intermodalism has spurred the creation of many companies–like International Cargo Control Pty Ltd., (ICC), the freight forwarder in this case–devoted not to actually moving cargo, but to the support and facilitation of transportation in a variety of ways. Among other services

these companies provide is the consolidation of many small shipments into large consignments for more economical shipping. *Id.* at 129.

B. Railroads and Other Participants in International Commerce Have Developed Efficient Business Practices Which Meet the Needs of All Parties

Because they require multiple modes of transportation as well as providers of associated services, international cargo shipments usually involve complex, multiparty transactions. However, despite their inherent complexities, these transactions have the straightforward goal of moving freight between two points. Shippers of cargo have an interest in making arrangements for a complete transaction, *i.e.*, shipment from origin to final destination, with all necessary transportation and associated services provided. With this aim in mind, the details of who is accomplishing each aspect of the service is of lesser importance. Shippers do not enter into individual relationships with numerous parties providing various aspects of the service, some of whom may be located on different continents. Nor would it be economically efficient if legal rules encouraged such arrangements.

Conversely, because import traffic (other than from Canada and Mexico), of necessity, must first travel on at least one other carrier before being interchanged to a North American railroad, the railroad is unlikely to have a direct relationship with the overseas shipper of the goods. Nor would it be practical to attempt to do so. Instead, a more efficient means of doing business has developed. Typically, railroads enter into arrangements with entities with U.S. contacts, such as domestically-based freight forwarders or similar parties, known more colloquially as "brokers" or "wholesalers." Under such arrangements, railroads may sell blocks of space on their trains in volumes to accommodate the cargo of

numerous shippers. Alternatively, railroads enter into similar arrangements with steamship companies calling on U.S. ports, agreeing to transport cargo that is off-loaded from their ships without regard to the identity of the individual shipper or the content of individual containers.

Securing space on the railroads for cargo entering the U.S. allows business to be conducted efficiently, obviating the need for foreign shippers to locate and make arrangements with a land-based U.S. carrier for each shipment. The ability to consolidate freight of numerous shippers and arrange for through transportation to destination, utilizing multiple carriers, some of whom the foreign freight forwarder need not directly contact, is of benefit to shippers worldwide. In addition to relieving the shipper of the need to enter into numerous discrete arrangements, the ability to tender large volumes of freight enables the freight forwarder to obtain better rates than could individual shippers attempting to ship small volumesof cargo.

Regardless of the precise arrangement, it is the general practice that a party other than the foreign shipper will directly make the arrangement that will result in its goods being placed on a train for inland transport in the United States. It goes without saying that a single entity does not (and cannot) transport goods both by sea and land, and also provide all the loading and unloading services as needed. But the fact remains that these are all pieces of the unitary service sought by the shippers wishing to move cargo from a specific origin point to a specific destination point. The shipper knows full well that when it is contracting for through transportation, it is contracting for services which inevitable will be performed by several parties, some located in different countries and continents.

C. Acceptance of Liability Limitations Supplemented By Insurance is the Normal Practice For Shipping International Cargo

As in all commercial arrangements, carriers involved in international transportation seek to memorialize their expectations in contract documents. Railroads set forth their terms of carriage, including liability limitations, in circulars or similar documents which are available to the shipping public. Knowing full well that the ocean carrier or wholesaler with whom they directly contract is not the only party with an interest in the transaction, railroads typically require that their terms be passed back to downstream parties. Such an arrangement was evident in this case, as both the bill of lading issued by ICC and the bill of lading issued by the ocean carrier incorporated the COGSA liability limitations and, through Himalaya clauses, extended those limitations to the other parties to the transaction.

COGSA affords shippers of cargo by sea a choice: to declare a higher value for the goods and pay a higher freight rate, or accept the liability limitations set forth in the statute. 46 U.S.C. app. §1304(5). The former option is almost never exercised. Instead, the shipper, accepting the carriers' limited liability, will choose to insure the cargo for its full value. This regime makes commercial sense. The shipper, with whom the traffic originates, knows exactly what is being shipped and the shipment's value. The carriers, particularly a railroad situated a continent away that has arranged to accept numerous containers without individualized inquiry as to the specific nature of the goods contained therein or the identity of the particular shipper of the goods, generally are not in a position to ascertain the goods' value. Shipments remain in their containers, unopened until final destination is reached. Thus, the shipper is in the best position to determine whether

to declare a high value or to insure, and at what level. Similarly, insurers who underwrite this insurance know they are insuring a risk for which other parties' liability is limited.

Shippers almost always find it far more cost effective to accept both the lower freight rate and associated limitation on liability, relying on insurance for protection against any outstanding risk. This was the course chosen in this case. See Petition at 28a ("In contracting, Kirby was given the opportunity to declare a value in excess of $500.00 and to obtain higher coverage for its cargo, paying an additional ad valorem rate charge for the shipment. Instead, Kirby separately insured its cargo with its co-plaintiff, MMI General Insurance, Ltd." *Kirby v. Norfolk Southern Ry. Co.*, No. 1:98RCV-2939-CAP (N.D. Ga., order of Oct. 11, 2000)). The fact that Kirby chose to insure the goods during transport, including the land portion (evidenced by the insurer's payment on the policy for damage occurring during the land portion), shows that it fully expected that the liability limitations to which it agreed in the ICC bill of lading were intended to extend to the land portion of the shipment. The practical effect of the Eleventh Circuit's decision is not to benefit the shipper who knowingly and freely, in its best judgment, has entered into these contractual limitations on damages, but instead to permit maritime insurers to reap a windfall by evading the contractual limitations on damages against which they insured the shippers and upon the basis of which they establish their premiums.

II. THIS COURT SHOULD REVIEW THE DECISION BELOW BECAUSE FAILURE TO RESOLVE THE CONFLICTS IT CREATES WILL UNDERMINE CARRIER EXPECTATIONS AND LEAD TO INEFFICIENT AND COUNTERPRODUCTIVE BUSINESS PRACTICES

The Eleventh Circuit's decision paid little heed to these well-established commercial practices. The court held that when contracting with the ocean carrier to move Kirby's goods, ICC did not act as Kirby's agent and therefore did not bind Kirby to the terms of the Himalaya clause in the ocean carrier's bill of lading, a contractual provision clearly meant to benefit petitioner. As petitioner points out, this contrasts with other courts that properly have recognized that shippers are to be held to the terms of the contracts through which freight forwarders arrange for transport of the shippers' goods with a carrier.[4] Staking out a different approach to this question, the Eleventh Circuit's decision raises doubt as to whether railroads can continue to rely on the terms of ocean carrier-issued bills of lading to limit railroad liability. This doubt is fueled by concern that the Eleventh Circuit's ruling will empower shippers to disavow any contractual obligations that, as a commercial practice, are entered into on the shipper's behalf by a freight forwarder whom the shipper authorizes to arrange transportation. *See Kukje Hwajae Ins. Co. v. M/V Hyundai Liberty,* 294 F.3d 1171, 1176 (9th Cir. 2002), citing to Martin Davies, *In Defense of Unpopular Virtues: Personification and Ratification,* 75 Tul. L. Rev. 337, 395-96 (2000). If railroads cannot contract with

[4] E.g., *Kukje Hwajae Ins. Co. v. M/V Hyundai Liberty*, 294 F.3d 1171 (9th Cir. 2002); *Carman Tool & Abrasives, Inc. v. Evergreen Lines*, 871 F.2d 897 (9th Cir. 1989); *Stolt Tank Containers, Inc. v. Evergreen Marine Corp.*, 962 F.2d 276 (2nd Cir. 1992). See Pet. at 14-18.

assurance to foreclose exposure to unforseen liability in excess of their contractual limitations, they may be compelled to require from the prior upstream party a defensive indemnity against liability in excess of the contractual limit. In turn, the other upstream parties involved in the ocean movement of the lading may take similar action. The creation of these linked indemnities will result in a cascade of parties being drawn into litigation if the shipper/insurer is able to bypass the freight forwarder's/ocean carrier's limitations of liability and proceed against the railroads or some other downstream party for excess recoveries.

More fundamentally, the Eleventh Circuit's decision will undo longstanding expectations of U.S. rail carriers and will require counterproductive alteration to a process that works efficiently and effectively to facilitate international commerce. The logical end of this ruling is that railroads would need to find a way to contract directly with parties with whom they would not ordinarily deal if they wished to assure they will benefit from the protection of liability limitations or other terms, a proposition of questionable feasibility and likely considerable expense. But this is precisely the reason that most courts have recognized that it is counterproductive to adhere to the fiction that the shipper is not bound by the terms of a bill of lading issued to the freight forwarder that has been engaged to arrange transportation for that shipper's goods. *Carman Tool & Abrasives, Inc. v. Evergreen Lines,* 871 F.2d 897 (9th Cir. 1989)("It would be next to impossible for a carrier to give actual notice of the liability limitations to everyone a court might later hold has a foreseeable economic interest in the goods. It could also substantially delay shipments . . ." *Id.* at 901)

Similarly, the distinction posited by the Eleventh Circuit between "relational" terms and "descriptive" terms when used in a Himalaya clause turns a blind eye to the business realities of this case and international commerce in general.

When a contract of carriage by its very nature calls for both ocean and land transportation, the shipper is well aware that, of necessity, the subcontractors involved will include a land-based carrier like a railroad. A contract that plainly extends liability limitations (or any terms) to other parties that will be performing the services contemplated by the parties–in this case, shipment of cargo from Australia to (inland) Alabama–must be enforced in accordance with its terms if established means of doing business are to be maintained.

Notwithstanding this Court's admonition that Himalaya clauses should be narrowly construed, *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297 (1959), a distinction must be recognized between construing a clause narrowly by limiting it to the reasonable meaning of the words used and interpreting a clause contrary to the intent and expectations of the parties. There is no rational basis for reading the railroad out of the Himalaya clause through a privity requirement. The railroad was not a remote entity whose involvement was too far removed to be contemplated by the parties. Rather, the railroad was an essential party that was fully contemplated by the shipper, and without which the services could not have been completed. As Judge Siler, whose dissent properly recognized the commercial realities of multimodal international transportation, pointed out: "When the bill of lading between Kirby and ICC was issued, Kirby knew that an inland carrier would have to be used, because of the destination being Huntsville, Alabama." 300 F.3d at 1312. Given this clear understanding, the Eleventh Circuit's privity requirement is properly seen as an artificial technicality that subverts the intent of the parties and undermines the effectiveness of the prevailing means by which carriers and shippers generally conduct their business.[5]

[5] Years ago, courts abolished the requirement of privity in product liability cases, recognizing the reality that the ultimate consumer, whose use of and potential injury by a manufactured product, though entirely foreseeable, in all likelihood will not have purchased the product directly from the manufacturer. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); WILLIAM L. PROSSER, LAW OF TORTS §96 at 641-43 (4th ed. 1971).

The friction between the Eleventh Circuit's holdings and both commercial realities and other federal appellate decisions makes review of this case by this Court imperative. Kirby enter into the contract knowing full well the kinds of services that would be required to complete the transportation it contracted for, and chose to decline to declare a value for its goods and pay a higher freight rate, opting instead to insure the goods for their full value. These decisions were reflected in the bill of lading issued by the ocean carrier to Kirby's freight forwarder. However, as a result of the Eleventh Circuit's decision, it is now unclear whether the law requires shippers in these circumstances to be held to the bargains struck on their behalf by freight forwarders simply because the freight forwarder, though never intending to transport any goods, designated itself a "carrier." If that is indeed a proper reading of the law, this Court should clearly so state so that participants in international commerce can adjust their conduct accordingly. Similarly, this Court should resolve the question of proper interpretation of Himalaya clauses, since the Eleventh Circuit's privity requirement has deepened a split among federal courts of appeals. Pet. at 23-26.

The major U.S. freight railroads operate over extensive networks of between 20 and 35 thousand miles,[6] covering numerous federal circuits. The major eastern carriers, petitioner and CSX Transportation, whose networks cover territory where the circuits are geographically smaller, operate in most of the federal circuits. The major western roads, Burlington Northern Santa Fe and Union Pacific,

[6] Association of American Railroads, *Railroad Facts* 69-70, 74, 76 (2002 ed.).

operate from the west coast, ultimately crossing the Mississippi river, also covering numerous circuits. Thus, a single bill of lading may cover transportation over several jurisdictions. (For example, a shipment from South America to a southeastern port, picked up by rail to destination at Boston, would likely move through states located in the Eleventh, Fourth, Third, Second and First Circuits.) The splits among the federal courts of appeals created and exacerbated by the decision below, if unresolved, will mean that a contract may have different meanings depending on where an accident or event giving rise to a dispute occurs. This is untenable for railroads. Failure to clarify the important issues raised by this case will leave participants in international commerce to operate under a cloud of uncertainty when moving billions of dollars of cargo over oceans and continents.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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February 6, 2003

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No. 02-1028

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY PTY LTD D/B/A KIRBY ENGINEERING,
MMI GENERAL INSURANCE, LTD.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF *AMICUS CURIAE* TRANSPORTATION LOSS PREVENTION AND SECURITY ASSOCIATION IN SUPPORT OF PETITIONER NORFOLK SOUTHERN RAILWAY COMPANY'S PETITION FOR WRIT OF CERTIORARI

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STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 the Transportation Loss Prevention and Security Association states that it is a non-profit corporation incorporated in New Jersey. Its shares are not traded.

STATEMENT OF CONSENT

The parties have consented to the filing of this brief.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Transportation Loss Prevention and Security Association "TLPSA" is a non-profit corporation incorporated in the State of New Jersey.[1] It is comprised of over sixty-five member organizations which are involved in the transportation of freight by truck within the United States. Members include trucking companies, large and small, some with revenues upwards of $2.5 billion. Its mission as stated in its bylaws is to:

> (1) provide continuing professional education to cargo claims professionals and their insurers, cargo security professionals, and law enforcement; (2) facilitate practical and effective communications between carrier and insurance personnel and law enforcement; (3) engage in legal and legislative advocacy on behalf of the membership.

A majority of its members transport freight to and from domestic locales as a component of continuous through movements in international transportation. As such, they frequently transport freight subject to ocean bills of lading which include Himalaya clauses as well as clauses Paramount. Consequently they are similarly situated to Petitioner Norfolk Southern Railway Company "Norfolk Southern". In fact, it is merely an accident of circumstance that a railroad rather than a trucker was retained to carry the freight in this controversy. Had the freight been bound for a town not served by a rail line, it would have been trucked. In addition, Norfolk Southern was only dispatched to deliver the freight to its rail ramp in Huntsville, Alabama. The ultimate destination was Athens, Alabama, thirty miles west, to which the freight would have eventually been short hauled by a trucker. Constituents of TLPSA include small trucking companies,

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[1] No other person or organization made a monetary contribution to the preparation of this brief.

which, unlike Petitioner Norfolk Southern do not have the financial wherewithal to absorb a $1.5 million judgment. Claims of such magnitude would force numerous truckers out of business. It is the considered opinion of TLPSA not only that the Eleventh Circuit decision is in error, but that if it remains intact it will have a chilling effect upon the willingness of trucking companies to accept import and export freight. TLPSA respectfully requests this Court to grant Norfolk Southern's Petition for Writ of Certiorari.

STATEMENT OF FACTS

There are two facts which TLPSA wishes to underscore.

The first is that the transaction which took place here was a very common one. An overseas freight forwarder made arrangements with an Australian transport company, a steamship company, and finally with a U.S. domestic freight carrier. Therefore, the party who prepared the bill of lading was not in direct privity with Norfolk Southern. Arrangements like these are the norm.[2]

The only shipping documents generated described the cargo as an ocean container "said to contain" technically described machinery.[3] There is no declaration of the value of the cargo and no description which indicates that the cargo was worth one and one-half million dollars. Had the freight been tendered to a trucking company, it would have been able to calculate a freight charge based upon weight and mileage, but would have had no data on which it could base a surcharge for exceptional liability exposure. It also would have no knowledge of the extraordinary value of the cargo it was hauling.

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[2] U.S. Department of Transportation Cargo Liability Study, August 1998, p. 13.

[3] Certiorari Petition, Appendix H.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari correctly argues that the decision below ignores controlling maritime precedent and creates an unwarranted and potentially confusing split of authority within the major maritime circuits.

From the perspective of the trucking companies who are represented by TLPSA, the Eleventh Circuit opinion fails to put the issues in proper context because it fails to appreciate the impact of recent deregulation, as well as the previous opinions of the Court germane to brokered freight.

The completely deregulated environment encourages the use of intermediaries to make arrangements between shippers and intermodal carriers. It also favors the presumption that cargo will move pursuant to a limitation of liability save for negotiated terms initiated by the shipper. These policy backdrops from the new deregulated world of transportation have been completely ignored by the lower court.

ARGUMENT

TLPSA does not wish to burden the Court with echoes. Norfolk Southern has ably highlighted the legal shortcomings of the Eleventh Circuit's opinion, as well as the dilution of uniformity within the Circuits and the specter of rampant forum shopping it entails.

Nonetheless TLPSA feels compelled to underscore that the impact of this decision will be contrary to the goals of the National Transportation Policy and the governing law as it has developed in the recently deregulated environment. TLPSA also wishes to call to the Court's attention the fact that even though Norfolk Southern's petition highlights a split between what it calls "primary circuits with maritime jurisdiction", that international intermodal freight of the kind

involved here is trucked into every circuit, including the Tenth and the Federal Circuits, which are the only circuits without a deep water port.

I. THE DECISION IS CONTRARY TO THE PUBLIC POLICY ENCOURAGING THE SEAMLESS USE OF TRANSPORTATION INTERMEDIARIES.

The lower court decision is flatly at variance with the well-established rule that when a shipper uses an intermediary to make its transportation arrangements it consents to be bound by whatever deal the intermediary negotiates.

Surface transportation was subject to pervasive regulation by the former Interstate Commerce Commission ("ICC"). A steady stream of ICC decisions beginning in 1976 as well as deregulatory legislation between 1980 and 1995 effectively morphed surface transportation from a system manipulated by regulators to one which is governed by market forces. Motor Carrier Act of 1980 Pub. Law. 96-296 94 Stat. 793; Trucking Industry Regulatory Reform Act of 1994 Pub. Law. 103-311, 108 Stat. 1683 (1994); Interstate Commerce Commission Termination Act of 1995 Pub. Law. 104-88, 109 Stat. 803 (1995).

This piecemeal deregulation of the freight transportation industry shifted the function of allocating rolling stock resources from the heavy hand of government to the silent arm of the marketplace. Relaxed entry requirements resulted in a proliferation of licensed carriers, so there are now upwards of 55,000 of them[4], many of them truck stop entrepreneurs with fleets comprised of only one, or perhaps a small handful of trucks. In this new milieu the matching of freight with a carrier to haul it is a much more haphazard and

[4] 104 U.S. Code and Administrative News, p. 804 (104th Cong. 1st Sess. 1995)

frenetic enterprise. Among the sidebar consequences of this sea change is the massive proliferation of transportation intermediaries who run the gamut from brokers who mix and match shippers with carriers, sometimes with the benefit of little more than a personal computer and a telephone, to third party logistics providers like GATX which operate as out-sourced traffic departments for large companies.

The ICC recognized and accommodated this shift in the marketplace by promulgating *Ex Parte* No. MC-96 Entry Control of Brokers 126 MCC 476 (1977) which loosened entry restrictions on brokers.

Over the course of the past decade countless intermediaries have entered the marketplace. The Transportation Intermediaries Association, for instance, was nonexistent until 1996 and now boasts over eight hundred active members. In 1980 Congress repealed the prohibition against motor carriers holding dual authority as both carriers and brokers. It is now not only common for freight to be brokered, it is downright common for freight to be rebrokered from entity to entity until a suitable empty truck can be found in the vicinity of the freight heading in the same direction in which the freight is bound.

In such an environment the privity envisioned by the Eleventh Circuit is an almost universal impossibility.

This Court recognized this fact of life long ago and in a much more simplified marketplace when it crafted the rules in *Great Northern Railroad v. O'Connor*, 232 U.S. 508 (1914) and later in *Chicago, Milwaukee, St. Paul & Pacific Railroad v. Acme Fast Freight, Inc.*, 336 U.S. 465 (1949). Simply put, a transportation intermediary stands in the shoes of a carrier *vis a vis* those entities looking to have the freight moved; and it stands in the shoes of a shipper *vis a vis* the entities it hires to move it. And any entity which retains the services of an intermediary is stuck with whatever deal the

intermediary negotiates. These principals are the glue which hold the modern transportation infrastructure together, and numerous lower courts have reaffirmed them in the modern setting. *Kansas City Fire and Marine v. Consolidated Rail Corporation*, 80 F.Supp.2d 447 (1999); *Burnett v. Butler Moving & Storage*, 826 F.Supp. 65 (N.D.N.Y. 1993); *Gulf & Western Ind. v. Old Dominion Freight Line*, 633 F.Supp. 688 (M.D.N.C. 1986).

This Court has also long held that an intermediate, or "downstream" carrier is entitled to avail itself of the same limitation of liability which applies to the initiating carrier. *Kansas City Southern Railway v. Carl*, 227 U.S. 639 (1912).

The Eleventh Circuit's abandonment of these long-standing principles of law and logic will have an immediate and deleterious impact on the nation's commerce.

The law of supply and demand creates a circumstance where the capacity of the country's rolling stock is roughly equivalent to the median amount of freight that needs to be moved. In fact, during the heyday of pervasive regulation, entry into the transportation market was predicated upon a showing that the public convenience and necessity required the services of a new entrant. Moreover, the former I.C.C. ordained the practice of assessing punitive "detention" and "demurrage" charges against shippers who tied up the country's rolling stock and kept it out of the service pool, because it was deemed to be an impediment to commerce.

It stands to reason that small motor carriers and perhaps even larger ones will be extremely reluctant to accept brokered freight from overseas for fear that they will be exposing themselves to a catastrophic loss like that here. As a result, the ability of importers to bring product to market irrespective of its value will be severely impaired and a

precipitous imbalance will obtain between the freight bound to and from U.S. ports and the available rolling stock needed to move it.

Scaring small carriers from the marketplace by exposing them to severe unwitting losses is inimical to the National Transportation Policy originally drafted in 1940 and now codified at 49 U.S.C. §13101(a)(2) which seeks to encourage reasonable rates, efficiency, service to small towns, profitability, and further seeks to promote intermodalism. The Eleventh Circuit's view will only promote higher freight rates and service shortages.

II. THE DECISION UNDERMINES THE RISK ALLOCATION REGIME ORDAINED BY CONGRESS AND WHICH ENCOURAGES THE APPLICATION OF LIMITATIONS ON CARRIER LIABILITY.

Congress has ordained a risk allocation regime which not only permits but endorses limitations on carrier liability. The system is designed to ensure that risk of loss is shared and encourages shippers to avail themselves of private insurance.

Limitations of carrier liability have ancient antecedents and are ubiquitous within the industry.

Limitations of liability serve the public policy function of protecting carriers from huge unforeseen losses and provide flexibility to shippers to decide whether they wish to assume risk themselves in exchange for lower freight rates or pay higher rates in exchange for full value liability by the carrier. These expedients are the logical outgrowth of the plain fact that the shipper is the only party who actually knows the value of its freight. As this Court put it long ago:

> There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion

> and agreement that its value is a lesser sum than that claimed after loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier.

Hart v. Pennsylvania Railway. Co., 112 U.S. 331, 340 (1884).

Accordingly, the liability of ocean carriers is limited by statute to $500 per shipping unit. Carriage of Goods by Sea Act 46 U.S.C. §1304(5). Limitations of liability in the volume transportation contracts of railroads are routinely upheld. *Cooperative Shippers, Inc. v. Atchison, Topeka & Santa Fe Railway Company*, 840 F.2d 447 (7th Cir. 1988). The liability of international air carriers is limited by treaty to the sum of $9.07 a pound. 49 U.S.C. §40105.

Domestic air freight like that here is governed by federal common law. *Diero v. American Airlines*, 816 F.2d 1360 (9th Cir. 1987). The law permits carriers to establish unilaterally limitations of liability which are routinely enforced when the plaintiff had reasonable notice of the limitation. *Diero v. American Airlines, supra*, p. 1365, *Reece v. Delta Airlines, Inc.*, 731 F. Supp. 1131, (D. Me. 1990).

No doubt hundreds of shipments arrive for filing at this very Court which are routinely subject to these limitations.

Domestic surface transportation was pervasively regulated by the Interstate Commerce Commission throughout the bulk of the last century. Trucking companies were regulated in the manner of public utilities. Rates were subject to challenge by competitors and the Commission reserved the right to require truckers to prove the reasonableness of their rates by presenting elaborate cost analyses. Carriers could only charge the rates they had on file with the Commission and unpublished discounts were strictly forbidden. *Maislin Industries v. Primary Steel*, 497 U.S. 116 (1990).

However, the Carmack Amendment to the Interstate Commerce Act as modified by the Cummins Amendment of 1916, specifically provided that carriers could offer a menu of published discount rates provided that the shipper was willing to accept a limited liquidated cap on the carrier's liability. The inherent equities of this arrangement have long been lauded by this Court:

> The underlying principle is that the carrier is entitled to base rates upon value and that its compensation should bear a reasonable relation to the risk and responsibility assumed. The broad purpose of the federal act is to compel the establishment of reasonable rates and to provide for their uniform application.

Southeastern Express Co. v. Pastime Amusement Co., 299 U.S. 28, 29, 57 S. Ct. 73, 81 L.Ed. 20 (1936). Accord: *Missouri, K&T.R. Co. v. Harriman Brothers*, 227 U.S. 657 (1913).

In fact, the only recognized exception to limitations of carrier liability was the circumstance where carriers deliberately converted the freight to their own use. *American Cyanamid v. New Penn Motor Express, Inc.*, 979 F.2d 310 (3rd Cir. 1992).

Over time a four-part test evolved within the case law which provided lower courts with the leverage to interject equitable considerations into such cases on an *ad hoc* basis. In order to establish limitations of liability carriers were required to:

- Maintain a filed tariff in accordance with ICC regulations;
- Give the shipper-consignor a reasonable opportunity to choose between two or more levels of liability;
- Obtain the shipper-consignor's agreement as to the choice of liability; and

- Issue a bill of lading or receipt prior to the shipment of the goods.

New York, New Haven & Hartford Railroad v. Nothnagle, 346 U.S. 128 (1953).

This test proved far less rigid than it appears. Filed tariffs were legally required, as was the uniform domestic bill of lading. Given that shippers were deemed to be on constructive notice of the rate menus in the carriers' filed tariffs, the middle prongs of the test were low hurdles. Eventually parallel lines of case law developed where the standard was applied narrowly in the case of commercial shippers but applied less rigidly for shippers of household goods and mom and pop enterprises. Despite the lack of any statutory mandates, the relative "sophistication" of the shipper became a criterion for decision in limitation of liability cases.

In 1977 the I.C.C. promulgated Released Rates Order No. MC 894, 353 I.C.C. 661 (1977) which endorsed the practice of carriers establishing by tariff rule that a shipper's omission to declare the value of its freight automatically resulted in the freight being transported at the lowest rate along with the concomitantly lower limitation of liability. The petitioner in that proceeding was a major shipper, IBM, which was having trouble distributing high value mainframe computers because carriers were reluctant to haul such expensive merchandise. That decision crystallized the overriding policy rationale supporting the limited liability regime: In order to protect motor carriers from catastrophic losses, and to allow shippers the flexibility to manage their risk as they see fit, the I.C.C. ordained a liability regime which shifted the burden for extraordinary losses to private insurers whose premium pool was far more widespread.

In 1994 Congress passed the Trucking Industry Regulatory Reform Act Pub. Law 103-311 (1994) which eliminated the

tariff filing requirement without considering the impact that the abandonment of the constructive notice doctrine would have on the limited liability regime.

When the issue was revisited with the passage of ICCTA in 1995 Congress adopted the following provision which placed a duty of inquiry upon the shipper to ascertain whether a quoted rate was tied to a limited liability provision:

> A motor carrier of property shall provide to the shipper, *on request of the shipper*, a written or electronic copy of the rate, classification, rules and practices upon which any rate applicable to its shipment or agreed to between the shipper and carrier is based.

49 U.S.C. §13710(a). (Underscore supplied.)

Thus Congress chose to replace the constructive notice regime with a system that placed the burden of inquiry on the shipper, rather than placing the burden of disclosure on the carrier.

ICCTA also directed that the Department of Transportation generate a cargo liability study summarizing the policies underlying the limitations governing the various modes and exploring the likelihood of harmonizing them. Among the DOT's findings and recommendations were these:

> Since enactment of TIRRA and ICCTA, shippers have complained about not knowing the limits of liability established by motor carriers. Sec. 10706 of title 49, United States Code, provides that, "upon request of the shipper," the carrier shall provide written or electronic notice of the rate, classification, rules, and practices on which the applicable price for the carriage is based. The nature of notice was altered. As a result, shippers can no longer be presumed to know the rate which the carriers maintain in their own filing systems, even when that system is open to the shippers upon request. The legal significance is that shippers can no longer be charged with constructive notice of the limitation. The shippers'

ability to participate in establishing a *reasonable* limitation was weakened when rate filing with ICC disappeared. Moreover, the independent arbitration of reasonableness which had been available through ICC disappeared. The carriers are now more or less free to limit their liability to any level they choose.

Department of Transportation Cargo Liability Study 1998, p. 33.

8.4 INSURANCE COVERAGE

Discussion: In domestic transportation, shippers currently carry a major portion of the risk of carriage, whether due to the effect of carriers' defenses to liability, because of unfiled claims, because shippers have agreed to less than full value liability, because of released rates, because carriers are unable to compensate due to bankruptcy, or due to carriers' simple refusal to make payment. Domestic shippers are exposed to a substantial risk which they should consider covering by cargo insurance in the same way that they cover their transportation risk in international carriage. Insurance to cover these risks is readily available and at reasonable cost.

Recommendation: Shippers are encouraged to cover their transportation risk exposure by cargo insurance. The existing insurance system appears adequate to serve shippers and carriers and there has been no suggestion that insurance is unavailable. A legislative or regulatory solution is not needed in this area.

Id p. 59.

While taking these steps to endorse a risk allocation scheme which burdens shippers' insurers while permitting carriers to avail themselves of limitations of liability, neither Congress nor the Department of Transportation took steps to amend 49 C.F.R. 387.303(c) which mandates that carriers need only maintain cargo insurance up to $10,000 per occurrence.

At first blush, this may seem somewhat lopsided. However, as the DOT Cargo Liability Study concluded based upon the evidence presented to it ninety percent of all freight that moves is valued at less than $10 a pound. *Id* p. 26. Therefore limitations of liability only protect carriers from extraordinary losses, and rarely absolve them from being answerable for loss or damage they may cause.

Thus, the public policy rationale which favors limitations of liability in air, and water transportation is likewise embraced in the sphere of domestic surface transportation.

CONCLUSION

Amicus curiae respectfully request that Norfolk Southern's Petition for Writ of Certiorari be granted.

Respectfully submitted,

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No. 02-1028

Supreme Court, U.S.
FILED
MAR 24 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY PTY LTD D/B/A KIRBY ENGINEERING, MMI GENERAL INSURANCE, LTD.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR CERTIORARI FILED JANUARY 6, 2003
CERTIORARI GRANTED JANUARY 9, 2004

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Letter from Randy L. Brink, Customer Service Representative, Norfolk Southern Corporation, to Alan Powell, Customs & Shipping Manager, Kirby Engineering (June 9, 1998), attached as Exhibit 7 to Brief by Plaintiff in Opposition to Motion for Partial Summary Judgment, *James N. Kirby, Pty Ltd.* v. *Norfolk S. Ry.*, No. 1-98-CV-2939-TWT (N.D. Ga. filed Apr. 13, 2000) 102

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NOTICE

The following documents have been omitted in the printing of this Joint Appendix. They may be found in the Petitioner's Appendix to the 02-1028 Petition For A Writ Of Certiorari at the following pages:

James N. Kirby, Pty Ltd. v. *Norfolk S. Ry.*, No. 01-13776-CC (11th Cir. Oct. 7, 2002) (order denying petitions for rehearing and rehearing en banc) 39a-40a

James N. Kirby, Pty Ltd. v. *Norfolk S. Ry.*, 300 F.3d 1300 (11th Cir. 2002) 1a-20a

James N. Kirby, Pty Ltd. v. *Norfolk S. Ry.*, No. 1-98-CV-2939-TWT (N.D. Ga. May 17, 2001) (order certifying an appeal to the court of appeals pursuant to 28 U.S.C. § 1292(b)) 21a-26a

James N. Kirby, Pty Ltd. v. *Norfolk S. Ry.*, No. 1-98-RCV-2939-CAP (N.D. Ga. Oct. 11, 2000) (order granting defendant partial summary judgment) 27a-38a

UNITED STATES DISTRICT COURT
GEORGIA NORTHERN DISTRICT

Case No. 1:98cv2939

JAMES N. KIRBY, PTY LTD. dba
KIRBY ENGINEERING,
Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Defendant.

MMI GENERAL INSURANCE LIMITED,
Plaintiff,

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
10/8/98	1	COMPLAINT filed and summons issued. Consent form to proceed before U.S. magistrate and pretrial instructions given to attorney; jury demand FILING FEE $150.00 RECEIPT # 430037 (bsm) [Entry date 10/16/98]
10/8/98	2	ANSWERS TO MANDATORY DISCLOSURES by plaintiff (bsm) [Entry date 10/16/98]
11/5/98	3	AMENDED COMPLAINT by plaintiff James N. Kirby, Pty adding MMI General Ins as plaintiff; jury demand (bsm) [Entry date 11/10/98]

DATE	NO.	PROCEEDINGS
12/9/98	4	ANSWER by defendant to complaint [1-1] Discovery ends 5/8/99 (bsm) [Entry date 12/10/98]
12/14/98	6	Return of service executed 11/19/98 as to Norfolk Southern RR on original complaint (bsm) [Entry date 12/28/98]
12/23/98	5	ANSWERS TO MANDATORY DISCLOSURES by defendant (bsm) [Entry date 12/24/98]
12/24/98	7	Certificate of interested persons. (to judge) (bsm) [Entry date 12/28/98]
12/28/98	8	Amendment to [5-1] answers to mandatory disclosures by defendant (bsm) [Entry date 01/04/99]
1/7/99	9	Preliminary Statement and Scheduling Order (to judge) (bsm) [Entry date 01/07/99]
1/21/99	—	ENDORSED ORDER on statement with SCHEDULING ORDER by Judge Thomas W. Thrash APPROVING [9-1] preliminary statement, Discovery ends 5/8/99, motions for sum.jgm. due 5/28/99, pre-trial order due on 6/8/99, if motions for sum.jgm. are filed, pre-trial order due w/in 30 days of disposition of sum.jgm. case to be be submitted on 6/11/99 if sum.jgm. or pre-trial order not filed (cc) (bsm) [Entry date 01/25/99]
4/21/99	10	Joint MOTION by parties to extend time for discovery (pdw) [Entry date 04/21/99]

DATE	NO.	PROCEEDINGS
4/21/99	11	ORDER by Judge Thomas W. Thrash GRANTING [10-1] joint motion to extend time for discovery, Discovery ends 11/8/99, motions for sum jgm to be filed by 11/29/99, if no sj motions are filed consolidated pre-trial order will be due 12/8/99, or 30 days after ruling on any sj motions case to be submitted on 12/14/99 if sj motions and/or pto are not filed (cc by crd 4/21/99) (pdw) [Entry date 04/21/99]
5/17/99	12	MOTION by dft to enjoin pla's from pursuing parallel cause of action in Australia with exhibits, attachments, and memo in support (gjt) [Entry date 05/20/99] [Edit date 05/20/99]
6/4/99	—	SUBMITTED to Judge Thomas W. Thrash on [12-1] motion to enjoin pla's from pursuing parallel cause of action in Australia (pdw) [Entry date 06/04/99]
6/4/99	13	Response by plaintiff in opposition [12-1] motion to enjoin pla's from pursuing parallel cause of action in Australia (gjt) [Entry date 06/08/99]
6/15/99	14	REPLY by defendant to response to pla's opposition to [12-1] motion to enjoin pla's from pursuing parallel cause of action in Australia (gjt) [Entry date 06/16/99]
7/30/99	15	Supplemental brief by plaintiffs in opposition to [12-1] motion to enjoin pla's from pursuing parallel cause of action in Australia (kt) [Entry date 08/03/99]

DATE	NO.	PROCEEDINGS
9/21/99	16	STATUS CONFERENCE HELD before Judge Thomas W. Thrash; counsel to present consent order regarding damage discovery after court's ruling on motion for summary judgment to be filed. (llg) [Entry date 09/22/99]
9/24/99	—	Steno notes of proceedings held 9/21/99 before Judge Thomas W. Thrash, by Court Reporter Linda W. Baggett. (pa) [Entry date 09/24/99]
10/12/99	17	MOTION by plaintiffs for leave to amend complaint with memorandum in support and Rule 26(a)(2) Disclosure of Expert. (second amended complaint attached) (llg) [Entry date 10/13/99] [Edit date 10/13/99]
10/26/99	18	Response by defendant to [17-1] motion for leave to amend complaint (llg) [Entry date 10/28/99]
10/26/99	19	Request for filing original discovery by defendant. (llg) [Entry date 10/28/99]
10/26/99	—	Proposed order extending discovery to 2/3/00 by defendant (llg) [Entry date 10/28/99]
11/1/99	—	SUBMITTED to Judge Thomas W. Thrash on [17-1] motion for leave to amend complaint (FILE IN CHAMBERS) (llg) [Entry date 11/01/99]
11/1/99	20	ORDER by Judge Thomas W. Thrash, extending discovery to 2/3/00, Discovery ends 2/3/00, pre-trial order due on 3/6/00, case to be submitted on 3/9/00 if no motions for summary judgment or pretrial order filed. (cc) (llg) [Entry date 11/02/99]

DATE	NO.	PROCEEDINGS
11/8/99	21	ORDER by Judge Thomas W. Thrash DENYING [12-1] motion to enjoin pla's from pursuing parallel cause of action in Australia by Norfolk Southern RR (cc) (llg) [Entry date 11/09/99]
11/12/99	22	Reply brief in support of [17-1] motion for leave to amend complaint by plaintiffs. (llg) [Entry date 11/16/99]
11/16/99	23	ORDER by Judge Thomas W. Thrash GRANTING [17-1] motion for leave to amend complaint (cc) (llg) [Entry date 11/17/99]
11/16/99	24	PLAINTIFFS' SECOND AMENDED COMPLAINT; jury demand (llg) [Entry date 11/17/99]
12/3/99	25	ANSWER by defendant to second amended complaint [24-1] (llg) [Entry date 12/06/99]
12/7/99	—	Case reassigned to Judge Charles A. Pannell. Calendar sheets forwarded and notice mailed to counsel. (so) [Entry date 12/07/99]
12/29/99	26	Amended Certificate of interested persons by dft. (to judge) (pdw) [Entry date 12/30/99]
1/27/00	27	Notice of filing expert witness disclosure by defendant. (als) [Entry date 02/02/00]
2/3/00	28	Joint MOTION and memorandum to extend discovery thru 3/10/00, and to modify scheduling order (to CAP) (als) [Entry date 02/04/00] [Edit date 02/09/00]

DATE	NO.	PROCEEDINGS
2/10/00	29	ORDER by Judge Charles A. Pannell GRANTING [28-1] joint motion to extend discovery thru 3/10/00 and [28-2] to modify scheduling order. Discovery ends 3/10/00, any motions for summary judgment are due 3/20/00, with the proposed consolidated pretrial order due w/in 30 days of the court's ruling on any motions for sum jgm. Pre-trial order due on 3/31/00 if no motions for sum jgm are filed (cc) (pdw) [Entry date 02/10/00]
2/16/00	30	Objections and responses by defendant to plaintiff's request for production served in the form of subpoena duces tecum to Gary Wolf (als) [Entry date 02/16/00]
3/10/00	31	Joint MOTION to extend discovery period, and to modify scheduling order (to CAP) (als) [Entry date 03/14/00]
3/20/00	32	Notice of filing the original affidavit of WESLEY B. ALEXANDER by defendant and request for the filing of original discovery. (ck) [Entry date 03/21/00] [Edit date 03/21/00]
3/20/00	33	MOTION by defendant for partial summary judgment and to dismiss plaintiff's state law claims with brief and statement of material facts in support. (ck) [Entry date 03/22/00] [Edit date 03/22/00]
3/22/00	—	ENDORSED ORDER by Judge Charles A. Pannell GRANTING [31-1] joint motion to extend discovery period, GRANTING [31-2] joint motion to modify scheduling order, Discovery ends 4/7/00 (cc) (als) [Entry date 03/22/00]

DATE	NO.	PROCEEDINGS
4/7/00	—	Proposed Consent Order extending time to respond to [33-1] motion for partial summary judgment [33-2] motion to dismiss plaintiff's state law claims thru 4/13/00. to CAP (fms) [Entry date 04/10/00]
4/11/00	34	CONSENT ORDER by Judge Charles A. Pannell extending time for pla to file response brief to dft's motion for sum jgm until 4/13/00 (cc) (als) [Entry date 04/12/00]
4/13/00	35	Brief by plaintiff in opposition to [33-1] motion for partial summary judgment with statement of material facts (ck) [Entry date 04/14/00]
4/13/00	36	Notice of filing original discovery by plaintiffs. (ck) [Entry date 04/14/00]
4/13/00	—	Deposition of GARY WOLF, BOB RALPH, CHARLES RICKARD, JON ROBERTSON, and HAYDEN NEWELL taken for plaintiffs (ck) [Entry date 04/14/00]
4/14/00	—	SUBMITTED to Judge Charles A. Pannell on [33-1] motion for partial summary judgment, [33-2] motion to dismiss plaintiff's state law claims (ck) [Entry date 04/14/00]
5/1/00	37	Reply Memo by defendant in support of [33-1] motion for partial summary judgment (als) [Entry date 05/04/00]
5/5/00	38	Notice of original discovery (depo of Wolf and excerpts of depos cited in motion for sum jgm) by plaintiffs. (crc) [Entry date 05/12/00]

DATE	NO.	PROCEEDINGS
5/5/00	—	Deposition of GARY P. WOLF taken for plaintiffs (crc) [Entry date 05/12/00]
10/11/00	39	ORDER by Judge Charles A. Pannell GRANTING [33-1] motion for partial summary judgment, GRANTING [33-2] motion to dismiss plaintiff's state law claims (cc) (***SET ASIDE PER ORDER FILED 1/19/01***) (als) [Entry date 10/13/00] [Edit date 05/08/01]
10/11/00	40	JUDGMENT ENTERED for defendant against plaintiffs (*** SET ASIDE per [48-1] order FILED 1/19/01***) (als) [Entry date 10/13/00] [Edit date 05/08/01]
10/11/00	—	Case terminated (als) [Entry date 10/13/00]
10/18/00	41	Offer of judgment [1-1] by defendant Norfolk Southern RR (ck) [Entry date 10/26/00]
11/8/00	42	NOTICE OF APPEAL by plaintiff from [40-1] judgment, [39-1] order FILING FEE $105.00 RECEIPT # 462544 Appeal information sheet due 11/22/00 (als) [Entry date 11/16/00]
11/13/00	43	Notice of filing Rule 10(b) certificate regarding no Transcript by plaintiffs. (als) [Entry date 11/16/00]
11/13/00	44	Bill of costs of defendant. (als) [Entry date 11/16/00]
11/15/00	45	Appeal information sheet RE: [42-1] appeal—COR due 11/25/00 (epm) [Entry date 11/17/00]

DATE	NO.	PROCEEDINGS
11/16/00	—	Notice of appeal and certified copy of docket, order and judgment to USCA RE: [42-1] appeal (als) [Entry date 11/16/00]
11/16/00	—	COSTS TAXED in the amount of $ 3,730.40 for defendant Norfolk Southern RR. (als) [Entry date 11/16/00]
11/21/00	46	Acknowledgment by USCA RE: [42-1] appeal USCA dkt no. 00-16047-I (epm) [Entry date 11/22/00]
11/22/00	47	MOTION by defendant for clarification or in the alternative to set aside the judgment with brief in support. (als) [Entry date 11/27/00]
11/24/00	—	CERTIFICATE OF READINESS of appeal record with certified copy of docket mailed to USCA RE: [42-1] appeal USCA # 00-16047-I (3 vols. pleadings, 6 depositions) (epm) [Entry date 11/24/00]
12/1/00	—	USCA acknowledgment of COR RE: [42-1] appeal USCA # 00-16047-I (epm) [Entry date 12/05/00]
1/8/01	—	SUBMITTED to Judge Charles A Pannell on [47-1] motion for clarification or in the alternative to set aside the judgment (als) [Entry date 01/08/01]
1/19/01	48	ORDER by Judge Charles A. Pannell GRANTING [47-1] motion for clarification or in the alternative to set aside the judgment, Pursuant to F.R.C.P. 60(a), the court hereby SETS ASIDE its entry of [40-1] judgment and dismissal. The case will proceed on the

DATE	NO.	PROCEEDINGS
		remaining breach of contract claim. (cc) (als) [Entry date 01/24/01] [Edit date 05/08/01]
1/19/01	—	Terminated submissions. (als) [Entry date 01/24/01]
3/28/01	49	Certified copy of ORDER of USCA DISMISSING [42-1] appeal for lack of Jurisdiction. USCA dkt no. 00-16047-II (als) [Entry date 04/05/01]
5/4/01	—	Case reopened per [48-1] order filed 1/19/01. (fms) [Entry date 05/08/01]
5/4/01	50	Joint MOTION to certify partial summary judgment for immediate permissive review (to CAP) (als) [Entry date 05/08/01]
5/17/01	51	ORDER by Judge Charles A. Pannell GRANTING [47-1] motion for clarification or in the alternative to set aside the judgment, Pursuant to F.R.C.P. 60(a), the court hereby SETS ASIDE the entry of judgment and dismissal [40-1], Case will proceed on remaining breach of contract claim, GRANTING [50-1] joint motion to certify partial summary judgment for immediate permissive review, the court AMENDS its order [39-1] and CERTIFIES its order for interlocutory appeal, staying proceedings until the Eleventh Circuit rules on immediate appeal (cc) (als) [Entry date 05/22/01] [Edit date 05/22/01]
7/9/01	—	Certified Copy of [51-1] order staying proceedings until the Eleventh Circuit rules on immediate appeal sent to USCA (als) [Entry date 07/09/01]

DATE	NO.	PROCEEDINGS
7/10/01	52	ORDER by USCA GRANTING PARTIES permission to file an INTERLOCUTORY APPEAL pursuant to 28 U.S.C. 1292(b). NOTICE OF APPEAL from [39-1] order, [40-1] judgment, [50-1] joint motion to certify partial summary judgment for immediate permissive review, [51-2] order, [51-1] order staying proceedings until the Eleventh Circuit rules on immediate appeal. Appeal information sheet due 7/24/01: USCA dkt no. 01-13776-C. (Appeal fee letter sent to counsel for pla & dft.) cc: USCA (jlm) [Entry date 07/12/01] [Edit date 07/12/01]
7/10/01	—	Memorandum assigning USCA docket no. 01-13776-C to Interlocutory [52-1] Appeal. (jlm) [Entry date 07/12/01]
7/19/01	—	Appeal fees received FILING FEE $105.00 RECEIPT # 474384 RE: [52-1] appeal USCA dkt no. 01-13776-C (jlm) [Entry date 07/20/01]
7/19/01	53	Appeal information sheet RE: [52-1] appeal— USCA dkt # 01-13776-C COR due 7/29/01 (jlm) [Entry date 07/20/01]
7/20/01	—	Forwarded notice of appeal fee payment to the USCA RE: [52-1] appeal USCA # 01-13776-C (jlm) [Entry date 07/20/01]
7/20/01	—	USCA acknowledgment of Order (Doc # 48) RE: [52-1] appeal USCA # 01-13776-C (jlm) [Entry date 07/23/01]
7/25/01	—	USCA acknowledgment of certified copy of docket sheets reflecting payment of appeal

DATE	NO.	PROCEEDINGS
		filing and docketing fees RE: [52-1] appeal USCA # 01-13776-C (kac) [Entry date 07/25/01]
8/20/01	—	CERTIFICATE OF READINESS of appeal record with certified copy of docket mailed to USCA RE: [52-1] interlocutory appeal USCA # 01-13776-C (3 vols pldgs; 6 depositions) (jlm) [Entry date 08/20/01]
8/24/01	—	USCA acknowledgment of COR (3 vols pldgs; 6 vols depositions) RE: [52-1] appeal USCA # 01-13776-C (jlm) [Entry date 08/27/01]
10/9/01	—	FORTHWITH LETTER from USCA regarding [52-1] appeal. USCA dkt no. 01-13776-CC Appeal record due on 10/19/01 (jlm) [Entry date 10/11/01]
10/11/01	—	Certified and transmitted record to USCA RE: [52-1] appeal USCA dkt no. 01-13776-CC (3 vols pldgs; 6 depositions) (jlm) [Entry date 10/11/01]
10/16/01	—	USCA acknowledgment of ROA RE: [52-1] appeal USCA # 01-13776-CC (epm) [Entry date 10/18/01]
10/21/02	54	Certified copies of opinion, bill of costs and JUDGMENT of USCA REVERSING and REMANDING to the District Court for further action RE: [52-1] appeal USCA dkt. # 01-13776. (dfb) [Entry date 10/23/02]
10/21/02	—	Appeal record (3 vols of pleadings & 6 depositions) returned from USCA RE: [52-1] appeal. USCA dkt. # 01-13776. (dfb) [Entry date 10/23/02]

DATE	NO.	PROCEEDINGS
10/23/02	—	Proposed order making the [54-1] mandate of the Circuit the judgment of this Court sent to CAP. (dfb) [Entry date 10/23/02]
10/25/02	55	ORDER by Judge Charles A. Pannell that the mandate of the USCA be and it hereby is made the judgment of this court, with remittitur notice (cc) (als) [Entry date 10/29/02]
11/12/03	—	Talked w/pla's counsel, case is still with the Supreme Court. (yrm) [Entry date 11/12/03] [1:98cv2939]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUT

No. 01-13776-CC

JAMES N. KIRBY,
MMI GENERAL INSURANCE LIMITED,
Appellants,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Appellee.

DOCKET ENTRIES

DATE	PROCEEDINGS
07/09/01	Probable Jurisdiction Noted
07/09/01	Order Transferring From Misc. # 01-90022-F
07/19/01	Fee Status: Paid (07/19/01) for James N. Kirby
07/19/01	Appearance Form Submitted: J.S. Scott Busby
07/19/01	Transcript Order Form: Appellant-Kirby, James N. (no hearing)
07/19/01	Civil Appeal Statement Form: Appellant-Kirby, James N.
07/27/01	BR1CIV (Brief Letter 1) issued. cc: Busby, J.S. Scott cc: Kyle, Steven J. cc: Hines, Richard K., V cc: Daly, Taylor Tapley
07/27/01	Briefing Notice Issued
07/30/01	Appearance Form Submitted: Richard K. Hines V
08/06/01	WRAP-1 (Wrappers w/ addresses) issued. To: Busby, J.S. Scott

DATE	PROCEEDINGS
08/06/01	Over the Phone Extension to File Apt Brief Granted by JA Until August 27, 2001
08/21/01	Certificate of Readiness
08/27/01	Appearance Form Submitted: Charles Robert Sharp
08/27/01	Appellant's Brief Filed: Appellants-James Kirby & MMI General Insurance, LTD. (Atty: Charles Robert Sharp)
08/27/01	Record Excerpts: Appellant-Kirby, James N. (Atty: Charles Robert Sharp): Appellant-MMI General Insurance Limited, (Atty: Charles Robert Sharp)
08/31/01	Motion to File Addendum to Appellant Brief: Appellant-Kirby, James N. (Atty: Charles Robert Sharp): Appellant-MMI General Insurance Limited, (Atty: Charles Robert Sharp)
09/10/01	Over the Phone Extension to File Appellee Brief Granted by TD Until 10/3/01: Appellee-Norfolk Southern Railway Company, (Atty: Richard K. Hines, V)
09/13/01	Appellant's motion for leave to file a separately bound addendum of authorities is GRANTED, without prejudice to Appellee's right to challenge . . . (see file for complete text) SFB
09/13/01	MOT2 (Motion—Court Action) issued. cc: Busby, J.S. Scott cc: Sharp, Charles Robert cc: Hines, Richard K., V cc: Kyle, Steven J. cc: Daly, Taylor Tapley
09/13/01	Addendum to Appellant's Brief

DATE	PROCEEDINGS
10/04/01	Appellee Brief Filed: Pt'd M:10/12 (stmt of juris) Appellee-Norfolk Southern Railway Company, (Atty: Richard K. Hines, V)
10/10/01	BR8CIV (Brief deficiency letter) issued. cc: Busby, J.S. Scott cc: Sharp, Charles Robert To: Hines, Richard K., V cc: Kyle, Steven J. cc: Daly, Taylor Tapley
10/11/01	Over the Phone Extension to File Reply Brief Granted by DHC until 10/29/01
10/12/01	Record on Appeal -
10/12/01	Exhibits
10/16/01	Motion to File Addendum to Appellee's Brief: Appellee-Norfolk Southern Railway Company, (Atty: Richard K. Hines, V)
10/29/01	Appearance Form Submitted: Michael F. Sturley
10/29/01	Reply Brief Filed: Appellant-Kirby, James N. (Atty: Charles Robert Sharp): Appellant-MMI General Insurance Limited, (Atty: Charles Robert Sharp)
11/27/01	Appearance Form Submitted: David C. Frederick
12/21/01	Motion to File Addendum to Appellee's Brief is GRANTED. (JLE)(j)
12/21/01	MOT2 (Motion—Court Action) issued. cc: Busby, J.S. Scott cc: Frederick, David C. cc: Sharp, Charles Robert cc: Sturley, Michael F. cc: Hines, Richard K., V cc: Kyle, Steven J. cc: Daly, Taylor Tapley

DATE	PROCEEDINGS
12/21/01	Addendum to Appellee Brief-Norfolk Southern Railway Company, (Atty: Richard K. Hines, V)
03/06/02	Oral Argument Scheduled: 03/06/02
03/11/02	David C. Frederick argued for Appellant; Richard K. Hines, V argued for Appellee
08/08/02	Judgment Entered
08/08/02	OPIN1A (Opinion—Issuance with Costs) issued. costs are taxed against the defendant-appellee on appeal. cc: Busby, J.S. Scott cc: Frederick, David C. cc: Sharp, Charles Robert cc: Sturley, Michael F. cc: Hines, Richard K., V cc: Siler, Eugene E., Jr.*
08/08/02	Opinion Issued—Reversed.
08/16/02	WRAP-1 (Wrappers w/ addresses) issued. cc: Siler, Eugene E., Jr.
08/22/02	Bill of Costs Filed: Costs awarded to Apellant: Appellant-Kirby, James N. (Atty: Michael F. Sturley): Appellant-MMI General Insurance Limited, (Atty: Michael F. Sturley)
08/29/02	Petition for Rehearing En Banc: Appellee-Norfolk Southern Railway Company, (Atty: Richard K. Hines, V)
08/30/02	WRAP-1 (Wrappers w/ addresses) issued. To: Siler, Eugene E., Jr.
10/07/02	The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition(s) for Rehearing En Banc are DENIED.

DATE	PROCEEDINGS
10/07/02	REHG1 (Rehearing—Transmittal) issued. cc: Busby, J.S. Scott cc: Frederick, David C. cc: Sharp, Charles Robert cc: Sturley, Michael F. cc: Hines, Richard K., V cc: Kyle, Steven J. cc: Daly, Taylor Tapley
10/18/02	CASE CLOSED—Mandate Issued
10/18/02	Mandate Issued
10/18/02	MDT1 (Mandate—Issuance) issued. cc: Busby, J.S. Scott cc: Frederick, David C. cc: Sharp, Charles Robbert cc: Sturley, Michael F. cc: Hines, Richard K. V To: Luther D. Thomas cc: Kyle, Steven J. cc: Daly, Taylor Tapley
01/13/03	Notice of Filing Certiorari—SC# 02-1028: Appellee-Norfolk Southern Railway Company, (Atty: Richard K. Hines, V)

IN THE SUPREME COURT OF NEW SOUTH WALES
SYDNEY REGISTRY
ADMIRALTY DIVISION

File No: 015 of 1998

JAMES N KIRBY PTY LIMITED trading as
KIRBY ENGINEERING ACN 000 056 717,
Plaintiff,

INTERNATIONAL CARGO CONTROL PTY LIMITED
ACN 003 020 835
First Defendant,

HAMBURG SUDAMERIKANISCHE DAMPFSCHIFFAHRTS-GESELLSCHAFT EGGERT & AMSINCK,
Second Defendant.

AMENDED

STATEMENT OF CLAIM

Filed for: James N Kirby Pty
Limited trading as Kirby Engineering

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1. At all material times the Plaintiff and the Defendants were incorporated and able to sue and be sued in their respective corporate names and styles.

As Against the First Defendant

2. Pursuant to bill of lading no. AU12-27086101 ("the Bill") dated 27 August 1997 the *First* Defendant agreed to carry on board the motor vessel "Queensland Star" ten containers containing equipment for a multi station transfer line ("the goods") in good order and condition for an agreed freight for carriage from Sydney to the port of Savannah, USA and from there for delivery of the

goods to Huntsville Ramp, Alabama USA in accordance with the terms and conditions of the Bill in the same good order and condition as when shipped. The Plaintiff shall seek leave to refer to the Bill when produced.

3. The Plaintiff was at all material times the owner of the goods.

4. The Plaintiff was the holder of the Bill, entitled to possession of the goods and entitled to delivery to it of the goods.

5. In the premises the Plaintiff is entitled to claim under and in respect of the Bill, the contract of carriage evidenced therein, and in respect of loss or damage to the goods.

6. The Bill is a clean Bill and it expressly acknowledges the shipment of the goods in apparent good order and condition.

7. It was a term of the Bill that the *First* Defendant would procure the transportation of the goods from Sydney to the Huntsville Ramp in Alabama and would be responsible for the goods and for any occurrence which caused loss or damage to the goods whilst in its charge unless the loss or damage was proven by the *First* Defendant not to have been caused or contributed to by any fault or neglect on its part or that of its servants or agents or on the part of any person of whose services the *First* Defendant made use.

Particulars

Clauses 2 and 6 of the Bill.

8. The following goods were delivered in a damaged condition.

Particulars

The goods contained in Containers TOLU 4692233, ISCU 4635342, TRLU 9028644, TOLU 4694977, TOLU 4685050 and TOLU 4531516 were required to be repaired or replaced:

1 lot of Allen Bradley electrical control equipment.

1 lot of Montronix electronic equipment—tool detection systems.

1 lot of fabricated box to house station electrical controls.

1 lot electrical transformers and replacement cables.

Bearings, lights, brackets, cords, metal plates, metal, machining, engineering supplies etc.

2 SMP fixture pallet receivers.

1 lot lubrication valves—system Gudel.

1 lot various hand tools.

1 lot Linear rails, ball screws and support bearings.

14 Whitnon/Setco precision boring heads.

3 Kirby special 30 degree twin spindle 3 axis units.

1 lot Workstation details.

2 Kirby CNC driven 3 axis units with flat platen.

9. The delivery of the goods in a damaged condition was a breach of the contract of carriage evidenced by the Bill.

10. By reason of the said breach the Plaintiff has suffered loss or damage.

Particulars	
1 lot of Allen Bradley electrical control equipment.	$563,950.00
1 lot of Montronix electronic equipment—tool detection systems.	111,404.00
1 lot of fabricated box to house station electrical controls.	1,309.00
1 lot electrical transformers and replacement cables.	7,814.00
Bearings, lights, brackets, cords, metal plates, metal, machining, engineering supplies etc.	26,166.00
2 SMP fixture pallet receivers.	46,539.00
1 lot lubrication valves—system Gudel.	7,926.00
1 lot various hand tools.	3,117.00
1 lot Linear rails, ball screws and support bearings.	9,200.00
Cost to inspect repair and test 14 Whitnon/Setco precision boring heads.	66,753.00
Three (3) only Kirby special 30° twin spindle 3 axis units. Reference #3800-10. Replacement units Op. 20 stations 14 Rh and 14 LH, Op 30 station 4 RH. $72,014 per unit based on standard costing.	216,042.00
Less salvage value three units.	(30,000)
1 lot workstation details.	1,972.00

Two (2) Kirby CNC driven 3 axis units with flat platen. Reference #3800-07. Replacement units Op. 30 stations 7 LH and 8 LH $72,014 per unit based on standard costing.	144,028.00
Less salvage value two units.	(20,000)
Travel costs Sydney, Alabama USA and return, including air fares, visa, taxi, etc (excluding wages) nett after 8.0% discount.	58,451.00
Engineers' daily on site allowance to cover meals, laundry and incidental costs. 21 engineers 565 days at $128.00/day	72,320.00
Accommodation—Alabama USA US$55/day or A$84.	44,268.00
Hire of vehicles—Alabama USA.	13,611.00
Communication costs—USA—Sydney: telephone, mobile phone, pager and facsimile.	8,900.00
On site project management and supervision 1,548 hours. Cost based on rate of $84.00 per hour including overtime.	130,032.00
On site engineers—mechanical 1,640 hours. Cost based on a rate of $75.00 per hour including overtime.	123,000.00
On site engineers—electrical/electronic 1573 hours. Cost based on a rate of $77.00 per hour including overtime.	121,121.00

Freight charges	15,719.00
Various miscellaneous purchases.	2,060.00
Project management costs Sydney. 506 hours at $75.00/hr.	37,950.00
Fees and charges provided by Delphi Saginaw Company, Alabama US$126,844.61 at $0.6510.	194,846.00
General administration fee based on 10% of all purchased items. $1,247,425.00	124,742.00
Less salvage Allen Bradley equipment US$24,965.20 at $0.6560.	(38,057)
TOTAL:	A$2,065,183.00

11. Further in the alternative in the premises the *First* Defendant was a bailee for reward and by reason of the bailment owed a duty to the Plaintiff to properly care for and handle the goods and to deliver the goods in the same good order and condition as and when shipped at Sydney.

12. In breach of its duties as bailee the *First* Defendant delivered the goods in a damaged condition and the Plaintiff has suffered loss or damage.

Particulars

The Plaintiff repeats the particulars of loss and damage referred to in paragraphs 8 and 10 above.

13. Further and in the alternative the *First* Defendant in the premises owed to Plaintiff a duty of care to ensure that the goods were transported safely and without damage.

14. Norfolk Southern Corporation was a person to whom the *First* Defendant entrusted the goods pursuant to the

Contract of Carriage with the Plaintiff evidenced by the Bill and for whose acts and omissions in respect of the goods the *First* Defendant was liable.

15. In breach of the said duty of care the *First* Defendant, by its servants or agents for whom it is responsible, was negligent in the carriage of goods.

Particulars of Negligence

(a) Norfolk Southern Corporation "NSC" failing to maintain the railway line over which the goods were to be transported;

(b) NSC running a railway line over an area of land which was unstable;

(c) NSC failing to maintain a traction vehicle so that bearings did not fail during the course of the journey;

(d) NSC failing to rectify the problems associated with the instability of the railway line;

(e) NSC's train travelling at a speed which caused or contributed to the carriages becoming derailed;

(f) Res ipsa loquitur.

These are the best particulars of negligence which the Plaintiff can provide until the Plaintiff has had the benefit of discovery of documents.

16. By reason of the said negligence of the *First* Defendant the Plaintiff has suffered loss or damage.

Particulars

The Plaintiff repeats particulars to paragraphs 8 and 10 above.

As against the Second Defendant

17. The Second Defendant was at all material times a bailee for reward of the goods and had a duty to the Plaintiff to properly care for the goods and deliver the goods in the

same good order and condition as when shipped at Sydney.

18. *In breach of its duties as bailee, the Second Defendant delivered the goods in a damaged condition.*

Particulars

The Plaintiff repeats particulars to paragraph 8 above.

19. *Further or alternatively, by a contract of carriage constituted or evidenced by a bill of lading No SUDU307000560273, issued at Sydney on or about 27 August 1997 ("the second Bill") the Second Defendant acknowledged receipt at Sydney for shipment on board the vessel "Queensland Star" of the goods in good order and condition for carriage from Sydney via the Port of Savannah for delivery in Huntsville, Alabama, USA in the same good order and condition as when shipped.*

20. *The Plaintiff was at all material times the owner of the goods, the holder of the second bill or the person entitled to possession of the goods and to delivery to it of the goods.*

21. *In the premises, the Plaintiff is entitled to claim under and in respect of the second Bill, the contract of carriage evidenced therein and in respect of loss or damage to the goods.*

22. *The second Bill is a clean Bill and it expressly acknowledges the shipment of the goods in apparent good order and condition.*

23. *The Plaintiff and/or its agent presented the second Bill for the purpose of taking delivery of the goods shipped thereunder.*

24. *In the premises, it was the duty of the Second Defendant under the contract to deliver the goods in the same good order and condition as they were in when shipped.*

25. *In breach of the said duty, or term, the Second Defendant failed to deliver the goods in good order and condition.*

Particulars

The Plaintiff repeats particulars to paragraph 8 above.

26. *Further or alternatively, it was the duty of the Second Defendant or a term of the contract that it, or its servants, agents or independent contractors for whom it is responsible, would exercise reasonable care of the goods during the loading, carriage and discharge thereof.*

27. *In breach of the said duty or term, the Second Defendant, or its servants, agents and/or independent contractors failed to exercise reasonable care of the goods whereby the goods were damaged.*

Particulars

The Plaintiff repeats particulars to paragraph 15 above.

28. *By reason of the Second Defendant's breach of duty the Plaintiff has suffered loss and damage.*

Particulars

The Plaintiff repeats particulars to paragraph 10 above.

29. AND THE PLAINTIFF CLAIMS:

As against the First Defendant

(a) Damages pursuant to paragraph 10 hereof.

(b) In the alternative, damages pursuant to paragraph 12 hereof.

(c) In the alternative, damages pursuant to paragraph 16 hereof.

As against the Second Defendant

(d) Damages pursuant to paragraph 18 hereof.

(e) In the alternative, damages pursuant to paragraph 25 hereof.

(f) In the alternative, damages pursuant to paragraph 28 hereof.

(g) Interest on the amounts referred to in (a), alternatively (b) and alternatively (c) above pursuant to s.94 of the *Supreme Court Act* 1970.

(h) Interest on the amounts referred to in (d), alternatively (e) and alternatively (f) above pursuant to s.94 of the Supreme Court Act 1970.

(i) Costs.

TO THE *FIRST* DEFENDANT:

INTERNATIONAL CARGO CONTROL PTY LIMITED
Level 5
Bayview Tower
1753 Botany Road
BANKSMEADOW NSW

TO THE SECOND DEFENDANT:

HAMBURG HAMBURG SUDAMERIKANISCHE DAMPFSCHIFFAHRTS-GESELLSCHAFT EGGERT & AMSINCK
C/- James Neill
Solicitor
3 Heron Cove Marina
Queens Parade West
Newport NSW 2106

You are liable to suffer judgment or an order against you unless the prescribed form of notice of your appearance is received in the registry within twenty eight (28) days after service of this Statement of Claim upon you and you comply with the Rules of the Court relating to your Defence.

PLAINTIFF:

JAMES N KIRBY PTY LIMITED
of 286 Horsley Road
MILPERRA NSW

PLAINTIFF'S SOLICITOR: STUART WILLIAM HETHERINGTON

PLAINTIFF'S ADDRESS FOR SERVICE:

WITHNELL HETHERINGTON
Solicitors
Level 8
167 Macquarie Street
SYDNEY NSW 2000
Tel: (02) 9223 9300
Fax: (02) 9223 9150

ADDRESS OF REGISTRY:

Supreme Court of New South Wales
Queens Square
SYDNEY NSW 2000

NOTICE FOR SERVICE AT DOCUMENT EXCHANGE

The Plaintiff may be served at the following exchange box in Sydney of the Australian Document Exchange Pty Limited:

Withnell Hetherington, Sydney DX 748

FILED: 5-1-1999

/s/ Stuart William Hetherington
STUART WILLIAM HETHERINGTON
Solicitor for the Plaintiff

The First Defendant consents to the Amended Statement of Claim being filed.

/s/ [Illegible]
Solicitor for the First Defendant

[Illegible]
[seal]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Case No. 1-98-CV-2939-TWT

JAMES N. KIRBY, PTY LTD. d/b/a KIRBY ENGINEERING,
and MMI GENERAL INSURANCE LIMITED,
Plaintiffs,

vs.

NORFOLK SOUTHERN RAILWAY COMPANY,
Defendant.

SECOND AMENDED COMPLAINT

COME NOW the Plaintiffs, James N. Kirby, Pty Ltd. ("Kirby") and MMI General Insurance Limited ("MMI") and hereby state their claim against Defendant, Norfolk Southern Railway Company ("Norfolk Southern") and hereby amend their Complaint pursuant to Fed. R. Civ. P. 15(a).

STATEMENT OF JURISDICTION AND VENUE

1.

Norfolk Southern is a Virginia corporation doing business and having its most significant contacts within the boundaries of the Northern District of Georgia and whose registered agent for service of process is F. Kennedy Hall, Esq. who can be served at Hall, Block, Garland & Meyer, Suite 1500, 577 Mulberry Street, Macon, Georgia 31208.

2.

Plaintiffs are both citizens of a foreign country, the Commonwealth of Australia.

3.

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1332(a)(2). The parties to this diversity action are a citizen of a State and citizens or subjects of a foreign state.

4.

The amount in controversy in this matter exceeds the sum of Seventy-Five Thousand Dollars ($75,000).

5.

Venue is proper in the Northern District of Georgia as Norfolk Southern is a corporation subject to personal jurisdiction within the boundaries of the State of Georgia and has the most significant contacts with the Northern District of Georgia of the three United States District Courts in the State of Georgia.

FACTUAL ALLEGATIONS

6.

In 1997, Kirby manufactured certain goods in Australia for delivery to a United States purchaser, General Motors Corporation, and for delivery in the State of Alabama.

7.

Kirby was at all times material to this matter the owner of said goods and MMI was at all times material to this matter, insurer of said goods on behalf of Kirby.

8.

Pursuant to bill of lading number AU12-27086101, dated August 27, 1997 (attached as Exhibit A), Kirby contracted with International Cargo Control, Pty Ltd. for the carriage of

ten containers containing the manufactured goods in good order and condition for an agreed freight for carriage from Sydney, Australia to the Port of Savannah, U.S.A: and from there for delivery of the goods to Huntsville Ramp, Alabama, U.S.A.

9.

International Cargo Control, Pty Ltd. then executed a bill of lading with Hamburg Südamerikanische Dampfschifahrts-Geseilschaft Eggert and Amsinck ("Hamburg Süd") trading as Columbus Line pursuant to bill of lading number SUDU 307000560273 (attached as Exhibit B) for carriage of the goods from the Savannah, Georgia terminal to the Huntsville Ramp, Huntsville, Alabama. Kirby was not a direct party to said bill of lading and had no knowledge of the terms of same.

10.

Hamburg Süd arranged for the waterliner service through its subsidiary, Columbus Line USA, Inc., which then sub-contracted with Norfolk Southern for the inland carriage of the goods from the terminal at Savannah, Georgia to the Huntsville ramp, Huntsville, Alabama. Kirby was not a direct party to said contract between Columbus Line USA, Inc. and Norfolk Southern and had no knowledge of the terms of same.

11.

There is no direct contractual relationship between Norfolk Southern and Kirby.

12.

The goods were entrusted to Norfolk Southern for the inland carriage; however, on October 9, 1997, the goods were damaged as a result of the derailment of the train carrying same while the goods were in the care of Norfolk Southern.

13.

The goods which were damaged were carried in containers delineated as follows: TOLU 4692233, ISCU 4635342, TRLU 9028644, TOLU 4694977, TOLU 4685050, and TOLU 4531516 and were items or components of sophisticated manufacturing equipment, including electrical control equipment, machining equipment, tool detection systems and various bearings, plates and engineering supplies. The cost of repairing and/or replacing said equipment totaled Two Million Sixty-Five Thousand One Hundred Eighty-Three Dollars ($2,065,183.00) (Australian) and said cost was borne collectively by Kirby and MMI.

COUNT I: NEGLIGENCE OF NORFOLK SOUTHERN

14.

Plaintiffs reallege and incorporate by reference Paragraphs 1-13 above as if set forth fully herein in support of Count I—Negligence.

15.

Norfolk Southern owed a duty to Plaintiffs as a carrier of goods owned by Kirby to ensure that the goods were transported safely and without damage.

16.

Norfolk Southern breached said duty by failing to exercise ordinary care:

(a) in failing to maintain the railway line over which the goods were to be transported;

(b) in running a railway line over an area of land which was unstable;

(c) in failing to maintain or keep in good repair a traction boxcar and/or its components so that bearings did not fail during the course of the journey;

(d) in failing to rectify any problems associated with the instability of the railway lines;

(e) in failing to travel at a safe speed for conditions;

(f) in failing to adequately and timely inspect said railway line so as to discover its defective and hazardous condition;

(g) in failing to adequately and timely inspect said traction boxcar and/or its components so as to discover its defective and hazardous condition;

(h) in allowing a defective traction boxcar to be utilized on the subject carriage of goods;

(i) in failing to operate or maintain its equipment in a reasonably safe manner; and

(j) res ipsa loquitor.

Discovery may also uncover additional breaches of said duty by Norfolk Southern.

17.

Norfolk Southern's breach of said duty was the proximate cause of property damage suffered by Plaintiffs inasmuch as the aforementioned breach(es) resulted in the derailment of the Norfolk Southern train which necessitated the repair or replacement of the goods delineated above.

18.

Plaintiffs suffered damage to the subject property in the amount of Two Million Sixty-Five Thousand One Hundred Eighty-Three Dollars ($2,065,183.00) (Australian).

COUNT II: RECKLESSNESS OF NORFOLK SOUTHERN

19.

Plaintiffs reallege and incorporate by reference Paragraphs 1-18 above as if set forth fully herein in support of Count II-Recklessness.

20.

Norfolk Southern owed a duty to Plaintiffs as a carrier of goods owned by Kirby to ensure that the goods were transported safely and without recklessness (with knowledge that damage would probably result).

21.

The subject segment of track where the derailment occurred and the configuration of the subject train required a heightened degree of care inasmuch as the track was characterized by a 1.5% downgrade through a series of three-six to eight degree-reverse curves with empty cars in front of loaded cars.

22.

Norfolk Southern breached said duty when it acted with recklessness and with knowledge that damage would probably result through the failure of the engineer to operate the train in accordance with Norfolk Southern's rules pertaining to braking, reflecting the engineer's failure to exercise a heightened degree of care given the subject track conditions and the configuration of the subject train. This failure constitutes a conscious disregard of a substantial risk of harm and knowledge that damage would probably result.

Discovery may also uncover additional recklessness by Norfolk Southern.

23.

Norfolk Southern's recklessness was the proximate cause of property damage suffered by Plaintiffs inasmuch as the aforementioned recklessness resulted in the derailment of the Norfolk Southern train which necessitated the repair or replacement of the goods delineated above.

24.

Plaintiffs suffered damage to the subject property in the amount of Two Million Sixty-Five Thousand One Hundred Eighty-Three Dollars ($2,065,183.00) (Australian).

COUNT III: PUNITIVE DAMAGES

25.

Plaintiffs reallege and incorporate by reference Paragraphs 1-24 above as if set forth fully herein in support of Count III—Punitive Damages.

26.

The aforementioned allegations in Count II for Recklessness constitute substantial evidence of wantonness and clear and convincing evidence that Norfolk Southern acted with a reckless and conscious disregard of the rights or safety of others and entitles Plaintiffs to an award of punitive damages pursuant to Ala. Code § 6-11-20.

COUNT IV: BAILMENT

27.

Plaintiffs reallege and incorporate by reference Paragraphs 1-26 as if set forth fully herein in support of Count IV-Bailment.

28.

As indicated in Paragraph 11 above, there is no direct contractual relationship between Kirby and Norfolk Southern;

however, in the alternative, and without prejudice to its claims in tort and contract, Plaintiffs allege that Norfolk Southern was a bailee with respect to the subject goods and by reason of the bailment owed a duty to Kirby to properly care for and handle the goods in question and to deliver them in the same condition as when shipped from Sydney.

29.

Norfolk Southern breached its duties as bailee by failing to deliver the goods in the same good condition as when shipped from Sydney, and as when tendered to its care at the Savannah terminal.

30.

As a result, Plaintiffs suffered damage to the subject property in the amount of Two Million Sixty-Five Thousand One Hundred Eighty-Three Dollars ($2,065,183.00) (Australian).

COUNT V: BREACH OF CONTRACT

31.

Plaintiffs reallege and incorporate by reference Paragraphs 1-30 as if set forth fully herein in support of Count V—Breach of Contract

32.

As indicated in Paragraph 11 above, there is no direct contractual relationship between Kirby and Norfolk Southern; however, in the alternative, and without prejudice to its claims in tort, recklessness and bailment, Plaintiffs allege that Norfolk Southern carried the goods incident to a contract and under duties sounding both in contract and tort.

33.

Norfolk Southern had a contractual duty to Plaintiffs to deliver the goods in the same condition in which it received the goods and without any damage to same.

34.

Norfolk Southern breached its contractual duty by failing to deliver the goods in the same condition as a result of the derailment of its train.

35.

Kirby's goods had to be repaired or replaced and caused Plaintiffs damage in the amount of Two Million Sixty-Five Thousand One Hundred Eighty-Three Dollars ($2,065,183.00) (Australian).

36.

Accordingly, in the alternative, Norfolk Southern is liable for breach of contract to Plaintiffs,

WHEREFORE, Plaintiffs pray for relief as follows:

(a) That Plaintiffs have judgment against Norfolk Southern in the amount of (Two Million Sixty-Five Thousand One Hundred Eighty-Three Dollars ($2,065,183.00) (Australian) or the equivalent in United States currency pursuant to Count I—Tort, Count II—Recklessness, Count III—Punitive Damages (in an amount to be determined by a jury), or in the alternative Count IV—Bailment, or in the alternative Count V—Breach of Contract;

(b) That Plaintiffs have judgment against Norfolk Southern pursuant to an amount to be determined by a jury;

(c) That this matter be tried by jury;

(d) That all expenses of litigation and all court costs in this matter be cast upon Defendant; and

(e) That Plaintiffs have such other and further relief as this Court may deem just and appropriate, including but not limited to the award of prejudgment interest and attorney fees.

Respectfully submitted,

/s/ Steven J. Kyle
STEVEN J. KYLE
Georgia Bar Number 430700
J. S. SCOTT BUSBY
Georgia Bar Number 098360

Attorneys for Plaintiffs

Bovis, Kyle & Burch, LLC
53 Perimeter Center East
3rd Floor
Atlanta, Georgia 30342-2298
Tel: 770-391-9100
Fax. 770-668-0878

[The International Cargo Control Bill of Lading (*see infra* at 78-99) was appended to the Second Amended Complaint as Exhibit A. The Hamburg Süd/Columbus Lines Bill of Lading (*see infra* at 48-77) was appended as Exhibit B.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Filed Dec. 3, 1999]

Civil Action File No. 1-98-CV-2939

JAMES N. KIRBY, PTY LTD. d/b/a KIRBY ENGINEERING,
Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Defendant.

ANSWER ON BEHALF OF NORFOLK SOUTHERN RAILWAY COMPANY'S SECOND AMENDED COMPLAINT

COMES NOW Norfolk Southern Railway Company (hereinafter "NSRC"), Defendant in the above-styled case, and timely files this its Answer to Plaintiffs' Second Amended Complaint as follows:

FIRST DEFENSE

Plaintiffs' Complaint fails to state a claim upon which relief can be granted, with the result that Plaintiff is not entitled to recover in this cause.

SECOND DEFENSE

Plaintiffs' claims are barred by the applicable statutes of limitations, statutes of repose, and the Norfolk Southern Intermodal Rules Circular and/or other Governing Publication and the rules set forth therein.

THIRD DEFENSE

Plaintiffs' claims are barred by the doctrines of release and accord and satisfaction.

FOURTH DEFENSE

In the event that Plaintiffs did not have or does not now have any title or interest in the goods which made up the shipment at issue, then Plaintiffs are not the real parties in interest and is not entitled to maintain this action.

FIFTH DEFENSE

The shipment at issue was loaded and counted by Plaintiffs and/or their agent(s) with the result that NSRC is not responsible for any damage to such shipment caused by the improper loading thereof.

SIXTH DEFENSE

If the shipment at issue suffered any loss, damage, or delay, such loss, damage or delay was caused by parties over whom NSRC had no control.

SEVENTH DEFENSE

Whatever shipments were received for transportation by NSRC were accepted in accordance with, and subject to, all the terms and conditions of the contract of carriage, any transportation agreements and the terms and conditions of NSRC's Intermodal Rules Circular or other Governing Publication and the rules set forth therein, which form the contract of carriage between the parties for the transportation of the shipments and the responsibilities of NSRC in this matter. NSRC duly performed the terms and conditions of the contract of carriage, and the transportation contracts bars Plaintiffs' recovery in this action.

EIGHTH DEFENSE

To the extent that Plaintiffs failed to meet the minimum filing requirements of filing a proper written claim within the time prescribed, and/or failed to file suit within the period prescribed, Plaintiffs' action is time barred.

NINTH DEFENSE

The bill of lading, tariffs and classifications and the governing publications do not contemplate responsibility for special damages. To the extent Plaintiffs seek recovery for special damages, such claims are barred.

TENTH DEFENSE

Plaintiffs' recovery, if it is entitled to any recovery which NSRC denies, is limited by statutory and contractual limitations of liability.

ELEVENTH DEFENSE

NSRC did not breach any contract running in favor of Plaintiffs.

TWELFTH DEFENSE

NSRC's maximum liability, if any, is limited to $500.00 pursuant to the bill of lading.

THIRTEENTH DEFENSE

Any state law claims asserted by Plaintiffs are preempted by federal law.

FOURTEENTH DEFENSE

Plaintiffs' action in negligence fails to state a claim upon which relief can be granted.

FIFTEENTH DEFENSE

NSRC has no liability in this cause because it was not guilty of any negligence in connection with the shipments at issue.

SIXTEENTH DEFENSE

The sole proximate cause of Plaintiffs' alleged loss, if any was sustained, was the negligence of Plaintiffs or other entities, whose acts or omissions NSRC was and is in no liable, with the result that Plaintiffs cannot recover in this action.

SEVENTEENTH DEFENSE

If there was any negligence on the part of NSRC—and NSRC denies same—nevertheless, the alleged negligence of NSRC was insulated by the subsequent acts and conduct of others, with the result that Plaintiff cannot recover in this action.

EIGHTEENTH DEFENSE

Plaintiffs' cause of action in bailment fails to state a cause of action upon which relief can be granted.

NINETEENTH DEFENSE

NSRC was not a bailee under the facts and circumstances of this case. Even if NSRC were a bailee, it did not breach any duties to Plaintiffs, with the result that Plaintiffs cannot recover in this action.

TWENTIETH DEFENSE

The damages claimed are speculative, remote or uncertain and Plaintiff has failed to mitigate its damages.

TWENTY-FIRST DEFENSE AND BY WAY OF FURTHER ANSWER

NSRC responds to the specifically numbered allegations of Plaintiffs' Second Amended Complaint as follows:

1.

NSRC admits that it is a Virginia corporation and that its registered agent for service in Georgia is as stated in Paragraph 1 of Plaintiffs' Second Amended Complaint; however, NSRC denies the remaining allegations of Paragraph 1, as stated.

2.

NSRC is without sufficient information to admit or deny the allegations of Paragraph 2 of Plaintiffs' Second Amended Complaint.

3.

With respect to Paragraphs 3 and 4 of Plaintiffs' Second Amended Complaint, NSRC admits that the case is brought under 28 U.S.C. § 1332(a)(2), but is without sufficient information to confirm the residency of the Plaintiffs, and denies the remaining allegations of said paragraphs.

4.

NSRC admits that venue in the Northern District of Georgia is appropriate, but denies the remaining allegations of Paragraph 5 of Plaintiffs' Second Amended Complaint.

5.

NSRC is without sufficient information to admit or deny the allegations of Paragraphs 6, 7, or 8, of Plaintiffs' Second Amended Complaint but on information understands that Plaintiff Kirby intended to ship certain goods on a through shipment from Australia to Huntsville, Alabama.

6.

Upon information NSRC admits those allegations of Paragraphs 9 and 10 of Plaintiffs' Second Amended Complaint, that International Cargo Control executed a bill of lading with Hamburg Sud and that Hamburg Sud and/or its agent Columbus Line USA subcontracted with NSRC for the inland carriage of the goods in question. NSRC states that Kirby is governed by the terms and conditions of Hamburg Sud/Columbus Line bill of landing and therefore denies the remaining allegations of these Paragraphs.

7.

NSRC denies the allegations of Paragraph 11 of Plaintiffs' Second Amended Complaint, as stated.

8.

NSRC denies the allegations of Paragraphs 12 and 13 of Plaintiffs' Second Amended Complaint.

9.

With respect to Paragraph 14 of Plaintiffs' Second Amended Complaint, NSRC incorporates by reference each and all of its affirmative defenses and responses to Plaintiffs' Complaint, as amended as if the same were set forth herein verbatim.

10.

NSRC denies the allegations of Paragraphs 15, 16 and all subparts, 17 and 18 of Plaintiffs' Second Amended Complaint. NSRC denies that it is liable to Plaintiffs in negligence. NSRC owed to Plaintiff only that duty which was created by the contract of carriage applicable to this shipment. NSRC did not breach any duty under said contract of carriage.

11.

With respect to Paragraph 19 of Plaintiffs' Second Amended Complaint, NSRC incorporates by reference each and all of its affirmative defenses and responses to Plaintiffs' Complaint and Second Amended Complaint as if the same were set forth herein verbatim.

12.

NSRC denies the allegations of Paragraphs 20, 21, 22, 23, and 24 of Plaintiffs' Second Amended Complaint.

13.

With respect to Paragraph 25 of Plaintiffs' Second Amended Complaint, NSRC incorporates by reference each and all of its affirmative defenses and responses to Plaintiffs' Complaint as amended, as if the same were set forth herein verbatim.

14.

NSRC denies the allegations of Paragraph 26 of Plaintiffs' Second Amended Complaint.

15.

With respect to Paragraph 27 of Plaintiffs' Second Amended Complaint, NSRC incorporates by reference each and all of its affirmative defenses and responses to Plaintiffs' Complaint as amended, as if the same were set forth herein verbatim.

16.

NSRC denies the allegations of Paragraphs 28, 29, and 30 of Plaintiffs' Second Amended Complaint. NSRC denies that it is liable to Plaintiffs in bailment. NSRC owed Plaintiffs only that duty which was created by the contract of carriage applicable to this shipment. NSRC did not breach any duty under said contract of carriage.

17.

With respect to Paragraph 31 of Plaintiffs' Second Amended Complaint, NSRC incorporates by reference each and all of its affirmative defenses and responses to Plaintiffs' Complaint as amended, as if the same were set forth herein verbatim.

18.

NSRC denies the allegations of Paragraphs 32, 33, 34, 35, and 36 of Plaintiffs' Second Amended Complaint.

19.

NSRC denies the prayers of paragraph 36 and subparts of Plaintiffs' Second Amended Complaint, denies that it is liable to Plaintiffs in tort, in contract, or under any other theory, and denies each and every allegation not specifically referred to herein by number. NSRC denies any liability to Plaintiffs and respectfully requests that it be discharged hence with its reasonable costs of court.

This 3rd dav of December, 1999.

/s/ Taylor Tapley Daly
TAYLOR TAPLEY DALY
Georgia Bar No. 697887
RICHARD K. HINES, V
Georgia Bar No. 356300
Attorneys for NORFOLK SOUTHERN

NELSON MULLINS RILEY & SCARBOROUGH, L.L.P.
999 Peachtree Street, N.E.
First Union Plaza, Suite 1400
Atlanta, GA 30309
(404) 817-6000

BEST AVAILABLE COPY

COLUMBUS LINE

HAMBURG SÜD
THE SHIPPING GROUP

BILL OF LADING
FOR EITHER COMBINED TRANSPORT OR PORT TO PORT SHIPMENT

SHIPPER/EXPORTER (COMPLETE NAME AND ADDRESS)
INTERNATIONAL CARGO CONTROL PTY LTD
1753 BOTANY ROAD
BANKSMEADOW NSW 2016
AUSTRALIA

BILL OF LADING NO: SUDU307000560273
EXPORT REFERENCES: LLOYDS LIST CODE:7226275

CONSIGNEE (COMPLETE NAME & ADDRESS)
AIR SEA INT'L FORWARDING INC
1155 WEST CHESTNUT STREET
SUITE 2-B
UNION, NEW JERSEY 07083
U.S.A.

FORWARDING AGENT REFERENCES

NOTIFY PARTY (COMPLETE NAME & ADDRESS)

PRE-CARRIAGE BY

PLACE OF RECEIPT: SYDNEY TERMINAL

VESSEL: QUEENSLAND STAR VOYAGE: 030N

PORT OF LOADING: SYDNEY

PORT OF DISCHARGE FROM VESSEL: SAVANNAH GA

PLACE OF DELIVERY: HUNTSVILLE AL

TYPE OF MOVE: HOUSE HOUSE

ORIGINALS TO BE RELEASED AT: SYDNEY

SHIPPER INFORMATION NOT PART OF THIS B/L CONTRACT

PARTICULARS FURNISHED BY SHIPPER

MARKS AND NUMBERS	NO OF PKGS	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASUREMENT
CONTAINER SEAL-NUMBERS TARE SIZE TYPE TOLU4694977 24485573 2250 20 OT 1 CONTAINER - SAID TO CONTAIN 2 PIECES PARTIAL SHIPMENT MULTI STATION TRANSFER LINE 70CMS O/HEIGHT			16630 KGS	41.000 M3
CONTAINER SEAL-NUMBERS TARE SIZE TYPE TOLU4692254 24485570 2250 20 OT 1 CONTAINER - SAID TO CONTAIN 2 PIECES PARTIAL SHIPMENT MULTI STATION TRANSFER LINE 52CMS O/HEIGHT			19890 KGS	41.000 M3
	10			

COPY not negotiable

FREIGHT CHARGES | RATED AS | PER | RATE | PREPAID | COLLECT | CURRENCY RATE OF EXCHANGE

NO ORIG B/L | TOTAL PREPAID | TOTAL COLLECT | FREIGHT PAYABLE AT: SYDNEY

PAGE 1

APPLICABLE ONLY WHEN USED FOR MULTIMODAL OR THROUGH TRANSPORTATION

PLACE AND DATE OF ISSUE: SYDNEY 27.08.97

COLUMBUS LINE AUSTRALIA, PTY. LTD.
A.C.N : 000 807 858

B/L CONTINUED ON PAGE 2

Form No 842825

Signed by Columbus Line Australia Pty Ltd A.C.N. 000 807 858 as agent for the Carrier Columbus Line

COLUMBUS LINE

HAMBURG SÜD
THE SHIPPING GROUP

BILL OF LADING
FOR EITHER COMBINED TRANSPORT OR PORT TO PORT SHIPMENT

SHIPPER/EXPORTER (COMPLETE NAME AND ADDRESS)

B/L CONTINUED FROM PAGE 1

BILL OF LADING NO: SUDU307000560273
EXPORT REFERENCES: LLOYDS LIST CODE:7226275

CONSIGNEE (COMPLETE NAME & ADDRESS)

FORWARDING AGENT REFERENCES

NOTIFY PARTY (COMPLETE NAME & ADDRESS)

DOMESTIC ROUTING (FOR THE ATTENTION OF THE PORT AUTH)

PRE-CARRIAGE BY

PLACE OF RECEIPT: SYDNEY TERMINAL

VESSEL: QUEENSLAND STAR VOYAGE: 030N

PORT OF LOADING: SYDNEY

PORT OF DISCHARGE FROM VESSEL: SAVANNAH GA

PLACE OF DELIVERY: HUNTSVILLE AL

TYPE OF MOVE: HOUSE HOUSE

ORIGINALS TO BE RELEASED AT: SYDNEY

SHIPPER INFORMATION NOT PART OF THIS B/L CONTRACT

PARTICULARS FURNISHED BY SHIPPER

MARKS AND NUMBERS	NO OF PKGS	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASUREMENT
CONTAINER SEAL-NUMBERS TARE SIZE TYPE TOLU4687900 24485569 2250 20 OT 1 CONTAINER - SAID TO CONTAIN 2 PIECES PARTIAL SHIPMENT MULTI STATION TRANSFER LINE 73CMS O/HEIGHT			19090 KGS	41.000 M3
CONTAINER SEAL-NUMBERS TARE SIZE TYPE BHCU2226201 24485572 2250 20 OT 1 CONTAINER - SAID TO CONTAIN 2 PIECES PARTIAL SHIPMENT MULTI STATION TRANSFER LINE 71CMS O/HEIGHT			16060 KGS	41.000 M3
CONTAINER SEAL-NUMBERS TARE SIZE TYPE TOLU4531516 24485575 2250 20 OT 1 CONTAINER - SAID TO CONTAIN				
	10			

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FREIGHT CHARGES | RATED AS | PER | RATE | PREPAID | COLLECT | CURRENCY RATE OF EXCHANGE

NO ORIG B/L | TOTAL PREPAID | TOTAL COLLECT | FREIGHT PAYABLE AT: SYDNEY

PAGE 2

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COLUMBUS LINE

HAMBURG SÜD
THE SHIPPING GROUP

BILL OF LADING
FOR EITHER COMBINED TRANSPORT OR PORT TO PORT SHIPMENT

SHIPPER (COMPLETE NAME AND ADDRESS)

BILL OF LADING NO: SUDU307000560273
BOOKING NO:
EXPORT REFERENCES: LLOYDS LIST CODE:7226275

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CONSIGNEE (COMPLETE NAME & ADDRESS)

FORWARDING AGENT - REFERENCES

POINT AND COUNTRY OF ORIGIN

NOTIFY PARTY (COMPLETE NAME & ADDRESS)

DOMESTIC ROUTING & INSTRUCTIONS (NOT PART OF B/L CONTRACT)

PRE-CARRIAGE BY (MODE)

PLACE OF RECEIPT: SYDNEY TERMINAL

A CODE | D CODE

VESSEL: QUEENSLAND STAR
VOYAGE: 030N

PORT OF LOADING: SYDNEY

TYPE OF MOVE: HOUSE HOUSE

ORIGINALS TO BE RELEASED AT: SYDNEY

PORT OF DISCHARGE FROM VESSEL: SAVANNAH GA

PLACE OF DELIVERY: HUNTSVILLE AL

SHIPPER INFORMATION NOT PART OF THIS B/L CONTRACT

PARTICULARS FURNISHED BY SHIPPER

MARKS AND NUMBERS	NO OF PKGS	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASUREMENT
		1 PIECE PARTIAL SHIPMENT MULTI STATION TRANSFER LINE 70CMS O/HEIGHT	14100 KGS	41.000 M3

CONTAINER	SEAL-NUMBERS	TARE	SIZE	TYPE
TOLU4692233	24485566	2250	20	OT

1 CONTAINER - SAID TO CONTAIN
1 PIECE
PARTIAL SHIPMENT MULTI STATION
TRANSFER LINE 58CMS O/HEIGHT — 12030 KGS 41.000 M3

CONTAINER	SEAL-NUMBERS	TARE	SIZE	TYPE
TRLU9028644	24485571	2250	20	OT

1 CONTAINER - SAID TO CONTAIN
2 PIECES
PARTIAL SHIPMENT MULTI STATION
TRANSFER LINE 62CMS O/HEIGHT — 17170 KGS 41.000 M3

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TOTAL NO OF PKGS: 10 | DECLARED VALUE

FREIGHT CHARGES	RATED AS	PER	RATE	PREPAID	COLLECT	CURRENCY	RATE OF EXCHANGE

NO ORIG B/L | TOTAL PREPAID | TOTAL COLLECT | FREIGHT PAYABLE AT: SYDNEY

PAGE 3

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COLUMBUS LINE AUSTRALIA, PTY. LTD.
A.C.N : 000 807 858

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Terminal code No. 842825

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COLUMBUS LINE

HAMBURG SÜD
THE SHIPPING GROUP

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PLACE OF RECEIPT: SYDNEY TERMINAL

A CODE | D CODE

VESSEL: QUEENSLAND STAR
VOYAGE: 030N

PORT OF LOADING: SYDNEY

TYPE OF MOVE: HOUSE HOUSE

ORIGINALS TO BE RELEASED AT: SYDNEY

PORT OF DISCHARGE FROM VESSEL: SAVANNAH GA

PLACE OF DELIVERY: HUNTSVILLE AL

SHIPPER INFORMATION NOT PART OF THIS B/L CONTRACT

PARTICULARS FURNISHED BY SHIPPER

MARKS AND NUMBERS	NO OF PKGS	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASUREMENT
		CONTAINER SEAL-NUMBERS TARE SIZE TYPE TOLU4685050 24485576 2250 20 OT 1 CONTAINER - SAID TO CONTAIN 1 PIECE PARTIAL SHIPMENT MULTI STATION TRANSFER LINE 58CMS O/HEIGHT	14540 KGS	41.000 M3

CONTAINER	SEAL-NUMBERS	TARE	SIZE	TYPE
ICSU4635342	24485574	2250	20	OT

1 CONTAINER - SAID TO CONTAIN
1 PIECE
PARTIAL SHIPMENT MULTI STATION
TRANSFER LINE 55CMS O/HEIGHT — 12500 KGS 41.000 M3

CONTAINER	SEAL-NUMBERS	TARE	SIZE	TYPE
TOLU4656468	2448557	2250	20	OT

1 CONTAINER - SAID TO CONTAIN

COPY not negotiable

TOTAL NO OF PKGS: 10 | DECLARED VALUE

FREIGHT CHARGES	RATED AS	PER	RATE	PREPAID	COLLECT	CURRENCY	RATE OF EXCHANGE

NO ORIG B/L | TOTAL PREPAID | TOTAL COLLECT | FREIGHT PAYABLE AT: SYDNEY

PAGE 4

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A.C.N : 000 807 858

L CONTINUED ON PAGE 5

Terminal code No. 842825

Signed by Columbus Line Australia Pty Ltd A.C.N. 000 807 858 as agent for the

COLUMBUS LINE

HAMBURG SÜD
THE SHIPPING GROUP

BILL OF LADING
FOR EITHER COMBINED TRANSPORT OR PORT TO PORT SHIPMENT

EXPORTER (COMPLETE NAME AND ADDRESS)

B/L CONTINUED FROM PAGE 4

BILL OF LADING NO: SUDU307000560273
BOOKING NO:
EXPORT REFERENCES: LLOYDS LIST CODE: 7226275

PLACE OF RECEIPT: SYDNEY TERMINAL

VESSEL: QUEENSLAND STAR
VOYAGE: 030N
PORT OF LOADING: SYDNEY
PORT OF DISCHARGE/FACTORY: SAVANNAH GA
PLACE OF DELIVERY: HUNTSVILLE AL
TYPE OF MOVE: HOUSE HOUSE
ORIGINALS TO BE RELEASED AT: SYDNEY

PARTICULARS FURNISHED BY SHIPPER

MARKS & NUMBERS	NO OF PKGS	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASUREMENT
	2	PIECES PARTIAL SHIPMENT MULTI STATION TRANSFER LINE 57CMS O/HEIGHT "EXPRESS BLADING EMAIL RELEASE" SHIPPERS LOAD & COUNT LOADED ON BOARD FREIGHT PREPAID	12030 KGS	41.000 M3

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TOTAL NO OF PKGS	DESCRIPTION
10	

FREIGHT & CHARGES	RATED AS	PER	RATE	PREPAID	COLLECT	EXCHANGE RATE OF EXCH

NO ORIG B/L	TOTAL PREPAID	TOTAL COLLECT	FREIGHT PAYABLE AT
			SYDNEY

PAGE 5

APPLICABLE ONLY WHEN USED FOR MULTIMODAL OR THROUGH TRANSPORTATION

PLACE AND DATE OF ISSUE: SYDNEY 27.08.97

COLUMBUS LINE AUSTRALIA, PTY. LTD.
A.C.N : 000 807 858

TYPE NUMBER 842825

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COLUMBUS

1. DEFINITIONS

a) "Carrier" means Columbus Line, which is the trade name used by Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft Eggert & Amsinck, Ost-West-Straße 59, 20457 Hamburg, Germany, the Carrier named on the face side hereof, the vessel, her owner, operator, demise charterer, time charterer, voyage charterer, space or slot charterer, sub-carrier and substitute carrier, whether acting as carrier or bailee.

b) "Charges" means freight, deadfreight, demurrage and all expenses and money obligations incurred and payable by the Merchant.

c) "Container" means any container, van, trailer, flatbed, transportable tank, railroad car, vehicle, flat, pallet, skid, platform, cradle, sling-load or any similar article of transport, not owned and any Container not supplied by or on behalf of the Carrier.

d) "Merchant" means the shipper, consignee, receiver, holder of this Bill of Lading, owner of the cargo or person entitled to the possession of the cargo and the servants and agents of any of these, all of whom shall be jointly and severally liable to the Carrier for the payment of all Charges, and for the performance of the obligations of any of them under this Bill of Lading.

e) "On Board" or similar words endorsed on this Bill of Lading mean that in a Port to Port movement, the Goods have been loaded on board the Vessel or are in the custody of the ocean carrier, and in the event of intermodal transportation, if the originating carrier is an inland carrier, means that the Goods have been loaded on board rail cars or another mode of transport at the Place of Receipt or are in the custody of a Participating carrier en-route to the Port of Loading named on the reverse side.

f) "Participating carrier" means any other carrier by water, land or air, performing any stage of the carriage, whether acting as sub-carrier, substitute carrier or bailee.

g) "Vessel" means the ocean vessel named on the face side hereof, and any substituted vessel, feedership, barge, or other means of conveyance by water used in whole or in part by the carrier.

2. CARRIER'S TARIFFS

The Goods carried hereunder are subject to all terms and conditions of Carrier's applicable tariff(s) on file with the Federal Maritime Commission, Interstate Commerce Commission or other regulatory body which governs a particular portion of the carriage. Said terms and conditions are hereby incorporated herein as part of the Terms and Conditions of this Bill of Lading. Copies of relevant provisions of applicable tariff(s) are obtainable from Carrier, Federal Maritime Commission, Interstate Commerce Commission or other regulatory body upon request. In the event of any conflict between the terms and conditions of such tariff(s) and the Terms and Conditions of this Bill of Lading, this Bill of Lading shall prevail.

3. RESPONSIBILITY; APPLICABLE LEGISLATION

a) The Carrier shall be responsible for the Goods from the time received at the Port of Loading until delivered (or should have been delivered) at the Port of Discharge and also during any previous or subsequent period of carriage performed under this Bill of Lading, subject to the provisions of any legislation compulsorily applicable to this Bill of Lading (1) which gives effect to the Hague Rules contained in the International Convention for the Unification of Certain Rules Relating to Bills of Lading, dated at Brussels, August 25, 1924, including adaptions thereof, such as the Carriage of Goods by Sea Act of the United States (hereinafter "COGSA") or (2) which gives effect to the said Rules as amended by the Protocols to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, dated at Brussels, February 23, 1968 (the "Visby Amendments") and December 21, 1979 (the "SDR Protocol"), including, if compulsorily applicable, the Australian Carriage of Goods by Sea Act, 1991 or (3) where the Hague Rules, adaptions thereof or Hague Visby Amendments (including the SDR Protocol) are not compulsorily applicable, this Bill of Lading shall take effect subject to any national law which may be in force at the Port of Loading or place of issue of the Bill of Lading making the United National Convention on the Carriage of Goods by Sea 1978 (the "Hamburg Rules") compulsorily applicable to this Bill of Lading, in which case this Bill of Lading shall have effect subject to the Hamburg Rules which shall nullify any stipulation derogating therefrom to the detriment of the Merchant. The applicable legislation shall govern during the Carrier's entire period of responsibility. In the absence of compulsorily applicable legislation, COGSA shall govern.

b) The Carrier shall, notwithstanding which legislation is applicable under a) above, be entitled to the benefit of Sections 4281 through 4287 of the Revised Statutes of the United States and amendments thereto, as if the same were expressly set out herein.

c) The rights, defences, immunities, exemptions, limitations of and exonerations from liability of whatsoever nature, provided for in this Bill of Lading, or (so far as may be permissible) under statute, shall apply in any action or proceeding brought against the Carrier, whether, in contract, tort or equity.

4. THROUGH TRANSPORTATION

a) When either Place of Receipt or Place of Delivery is set forth herein and is an inland point (Through Transportation basis), Carrier will procure transportation to/from sea terminal and such inland points, which may well involve transport by rail and, notwithstanding anything herein contained, but always subject to Clause 3, hereof, Carrier shall be liable for loss or damage of whatsoever nature and however arising to the following extent, but no further:

(i) Upon proof that the loss or damage arose during a part of carriage made subject to Hague Rules legislation or Protocols amending said Rules, as set forth in Clause 3, above, said legislation shall apply; or

(ii) Upon proof that the loss or damage not falling within a) above but concerning which the law of any country, state or subdivision thereof contains compulsorily applicable provisions and would have applied if Merchant had made a separate and direct contract with Carrier or a Participating carrier relative to a particular stage of transport wherein the loss or damage occurred and received as evidence thereof a [illegible]

TERMS AND CON

terms or manner in which Goods are stuffed, stowed or Carrier does not represent quantity, weight, condition contents inserted in Bill of Lading to be accurate or oth proper.

c) (1) The Terms and Conditions of this Bill of Ladin bility in connection with or arising out of the supply of supplied before or after Goods are received by the Carri

2) If the Container has been stuffed by or on beh

(A) Carrier shall not be liable for loss of or damage t

(i) caused by manner in which Container has be
(ii) caused by unsuitability of Goods for carriage
(iii) caused by unsuitability or defective condition

provided that where Container has been supplied by or o paragraph (iii) shall only apply if the unsuitability or defective

a) without any want of due diligence on Carrier's
b) would have been apparent upon reasonable in

to time Container was stuffed;

(iv) if Container is not sealed at commencement has agreed to seal Container.

B) Merchant shall defend, indemnify and hold Carrier ange, claim, liability or expense whatsoever arising from (A) above except for (A) (iii) (a).

(3) Where Carrier is instructed to provide a Container to contrary, Carrier is not under an obligation to provide quality.

(d) When a Container is to be stripped by or on behalf promptly strip, or cause to be stripped, Container and t spective of condition of Goods. Further, Merchant shall damage or expense of whatsoever nature arising or res occurring, including but not limited to loss or damage to conveyance or to other cargo, property or persons, whether evident or later manifests itself.

(e) When any Container utilized is owned or leased Carrier's custody, Merchant shall be and remain liable, at time allowed for the use of such Container, and for any lo by Carrier as a result of failure to return the Container to dition and state of cleanliness as when received by M condition caused by Goods does not then manifest itself expense at a subsequent time.

(f) Merchant agrees to be responsible for all expenses Goods and Containers are in the custody of Carrier or any or servants, including but not limited to repairs, reconditio and taxes, civil or criminal, and whether charged to the Carrier, Vessel, other conveyance, Participating carrier, its vants, which result for the acts or omissions to act on par vants, or third-parties for whom Carrier, Participating carri not responsible, and to submit to jurisdiction of any cour whom Carrier may be brought.

(g) Carrier's prior written consent in writing require Goods, which must be distinctly marked as such on outsi

(h) Merchant warrants that it has complied with all s and requirements of Customs, Port and any other Au Containers, documentation and any other matters affecting

9. CONTAINERIZED CARGO

Goods may be stowed by Carrier in Containers, and Carrier or received fully stowed, may be carried on or u Merchant expressly agrees that cargo stowed in a Contain sidered for all legal purposes to the cargo stowed under deck on deck shall be subject to the legislation referred to in Cla and/or receive compensation in General Average, as the c

10. CONTAINERS WITH HEATING OR REEFER APPARA

Containers with temperature or atmosphere-controlled eration or otherwise will not be furnished unless expressly of booking and, when furnished, may entail increased Cha request, it shall be conclusively presumed that use of a dry Goods.

Merchants must provide Carrier with desired tempe Containers to Carrier, and Carrier to exercise due diligenc within a reasonable range while in its custody or control. I responsibility for the functioning of temperature or atmosp owned or leased by Carrier or related companies.

11. DECK CARGO

Deck cargo (except that carried in Containers on deck and carried solely at Merchant's risk (including jettison Carrier will not in any event be liable for any loss or da caused, however occasioned by applicable law, or loss o due to the fault of the Carrier, any warranty of seaworthine by waived. Except as may be otherwise provided, such ship and shall be subject to all terms and Conditions of this Bill

12. METHODS AND ROUTES OF TRANSPORTATION; LIB

Without derogating from the Carrier's obligation to d Discharge subject to these Terms and Conditions

...place of receipt or Place of Delivery as set forth hereof and is an inland point (Through Transportation basis), Carrier will pro... transportation to/from sea terminal and such inland points, which may well ... transport by rail and, notwithstanding anything herein contained, but always subject to ... set forth herein, Carrier shall be liable for loss or damage of whatsoever nature and however arising to the following extent, but no further:

a) Upon proof that the loss or damage arose during a part of Carriage made subject to Hague Rules legislation or Protocols amending said Rules, as set forth in Clause 3, above, said legislation shall apply; or

b) Upon proof that the loss or damage not falling within a) above but concerning which the law of any country, state or subdivision thereof contains compulsorily applicable provisions and would have applied if Merchant had made a separate and direct contract with Carrier or a Participating carrier relative to a particular stage of transport wherein the loss or damage occurred and received as evidence thereof a particular document required to be issued, then the liability of the Carrier and Participating carrier shall be subject to the provisions of such law.

c) If it should be determined that Carrier bears any responsibility for loss or damage occurring during the custody of the Participating carrier and be subject to law compulsorily applicable to Participating carrier's contract of carriage, then Carrier shall be entitled to all rights, defences, immunities, exemptions, limitations of and exonerations from liability of whatsoever nature accorded under such Participating carrier's contract of carriage, tariff, and applicable law, provided however, that nothing contained herein shall be deemed a surrender by Carrier of any rights, defences and immunities or an increase of any of its exemptions, limitations of or exonerations from liability under this Bill of Lading, the Carrier's applicable tariff or laws applicable or relating thereto.

d) Except where COGSA is compulsorily applicable or is made applicable by this Bill of Lading, Carrier's liability for loss of or damage to the Goods shall not in any event exceed U.S.DLRS. 2.50 per kilo of gross weight of the Goods lost or damaged.

5. SUB-CONTRACTING; BENEFICIARIES

a) The Carrier shall be entitled to sub-contract on any terms the whole or any part of the carriage, loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by it in relation to the Goods or Containers or other packages or any other goods.

b) It is understood and agreed that if it should be adjudged that any person or entity other than or in addition to the Carrier is under any responsibility with respect to the Goods or any other goods, regardless of the port or place where any loss or damage shall occur and without regard to whether the Goods covered hereby or any other goods are being handled or are damaged directly or indirectly during any handling, and even if the Goods or other goods are transported on free in, stowed and/or free out terms, all exemptions, limitations, of and exonerations from liability provided by law or by the terms and conditions hereof shall be available to all agents, servants employees, representatives, all Participating (including Inland) carriers and all stevedores, terminal operators, warehousemen, crane operators, watchmen, carpenters, ship cleaners, surveyors and all independent contractors whatsoever. In contracting for the foregoing exemptions, limitations of and exonerations from liability, the Carrier is acting as agent and trustee for and on behalf of all persons described above, all of whom shall to this extent be deemed to be a party to the contract evidenced by this Bill of Lading, regardless for whom acting or by whom contracted and paid, it being always understood that said beneficiaries are not entitled to any greater or further exemptions, limitations of or exonerations from liability than those that the Carrier has under this Bill of Lading in any given situation.

c) The Carrier undertakes to procure such services as necessary and shall have the right at its sole discretion to select any mode of land, sea or air transport and to arrange participation by other carriers to accomplish the total or any part of the carriage from Place of Receipt to Place of Delivery, except as may be otherwise provided herein.

d) No agent or servant of the Carrier shall have power to waive or vary any of the terms hereof unless such waiver or variation is in writing and is specifically authorized or ratified in writing by an officer or director of the Carrier having actual authority to bind the Carrier to such waiver or variation.

6. WARRANTY

The Merchant warrants that in agreeing to the Terms and Conditions hereof, he is, or has the authority of, the person owning or entitled to the possession of the Goods and this Bill of Lading.

7. OPTION OF INSPECTION

The Carrier shall be entitled, but not obligated to open any Container at any time and to inspect contents. If it appears that the contents or any part thereof cannot safely or properly be carried or carried further, either at all or without incurring additional expense, Carrier may abandon the transportation and/or take any measures and/or incur any reasonable additional expenses to continue the carriage or store the Goods which storage shall be deemed to constitute due delivery hereunder. The Merchant shall indemnify the Carrier against any reasonable additional Charges so incurred, unless due solely to Carrier's fault.

However, before taking any of the above steps, the Carrier shall, if feasible, make all reasonable attempts to notify all cargo interests identified in Bill of Lading otherwise known to Carrier to have any interest in Goods of its intention to take such step(s).

8. DESCRIPTION OF GOODS; RESPONSIBILITY OF MERCHANT AND GOODS

a) Neither Carrier, nor its agents and servants, shall be liable for, or concluded as to, correctness of any marks, descriptions or other representations furnished or made by or on behalf of Merchant or appearing on the Goods or documents relating thereto.

b) When a Container is stuffed by or on behalf of Merchant, such Container shall be deemed shipped as "Shipper's weight, load and count". Merchant agrees that Carrier has no reasonable means of checking quantity, weight, condition, identity or existence of con-

...whether or not connected by Carrier or related companies.

11. DECK CARGO

Goods (except that carried in Containers on deck) shall be stowed and carried solely at Merchant's risk (including jettisoned or washed overboard). Carrier will not in any event be liable for any kind of damage to or ... overweight, unless it is expressly by applicable law, or from any other cause due to the fault of the Carrier, any warranty of seaworthiness in the premises by waived. Except as may be otherwise provided, such shipments shall be and shall be subject to all terms and Conditions of this Bill of Lading.

12. METHODS AND ROUTES OF TRANSPORTATION; LIBERTIES

Without derogating from the Carrier's obligation to carry the Goods ... Discharge subject to these terms and Conditions, with respect to the Goods or other packages, the Carrier may at any time and without notice to the ...

a) use any means of transport (water, land and/or air) or storage whatsoever;

b) tranship or carry on another vessel or conveyance or by any other ... port than that named on the reverse side hereof;

c) carry Goods on or under deck at its option;

d) proceed by any route at its sole and absolute discretion and whether ... most direct, customary or advertised route or in or out of navigational order;

e) proceed to or stay at any place whatsoever once or more often and ... omit calling at any port, whether scheduled or not;

f) depart and/or store at any place whatsoever, ashore or afloat, in the open;

g) proceed with or without pilots;

h) carry livestock, contraband, explosives, munitions, warlike stores, hazardous Goods or Goods of any and all kinds;

i) dry-dock or stop at any unscheduled port for bunkers, repairs or whatsoever;

j) comply with any orders, directions or recommendations given by any authority or by any person or body acting or purporting to act with the authority of any government or authority or having under the terms of the insurance on the vessel ... employed by the Carrier the right to give such orders, directions or ...

k) take any other steps or precautions as may appear reasonable to the circumstances.

The liberties set out in subdivisions a) through k) may be invoked whatsoever even if not connected with the carriage covered by this Bill of ... action taken or omitted to be taken, and any delay arising therefrom, shall be within the contractual and contemplated carriage and not be an unreasonable ...

In no circumstance whatsoever shall the Carrier be liable for direct, indirect or consequential loss or damage caused by delay.

13. DELIVERY

If delivery of the Goods or Containers or other packages or any part ... taken by the Merchant when and where and at such time and place as they are ... tified to have the Merchant take delivery, they shall be considered to have ... to the Merchant, and the Carrier may, at its option, subject to its lien and ... elect to have same remain where they are or sent to a warehouse or other ... or devanned, always at the risk and expense of the Merchant and Goods.

In South America and Caribbean areas (that is, in those specific locations ... Hamburg Rules are compulsorily applicable) it is hereby agreed that the ... of the goods shall be six (6) months from the date of shipment.

14. CHARGES, INCLUDING FREIGHT

The Charges payable hereunder have been calculated on the basis of ... nished by or on behalf of the Merchant. The Carrier shall, at any time, ... inspect, reweigh, remeasure or revalue the contents and, if any of the particulars ... by the Merchant are found to be incorrect, the Charges shall be adjusted and ... the Merchant shall be responsible to pay the correct Charges and all costs ... by the Carrier in checking said particulars or any of them.

Charges shall be deemed earned on acceptance of the Goods or Containers ... packages for shipment by the Carrier and shall be paid by the Merchant in full ... offset, counterclaim or deduction, cargo and/or vessel or other conveyance ... and shall be non-returnable in any event.

The Merchant shall remain responsible for all Charges, regardless of ... Lading be marked, in words or symbols, "Prepaid", "To be Prepaid" or "Collect".

In arranging for any services with respect to the Goods, the Carrier is ... ered the exclusive agent of the Merchant for all purposes, and any payments ... other than the Carrier shall not, in any event, be considered payment to the ...

The Merchant shall defend, indemnify and hold the Carrier, any Participating ... their agents and servants, harmless from and against all liability, loss, ... expenses which may be sustained or incurred by the Carrier relative to the ...

15. CARRIER'S LIEN

Carrier shall have a lien on Goods and any Charges and documents ... for all sums due under this contract or any other contract or undertaking ... Merchant (as defined herein) was party or otherwise involved, which lien shall ... to General Average contributions, salvage and costs of recovering such sums, ... attorney fees, and shall survive delivery. Such lien may be enforced by Carrier's ... private sale at expense of and without notice to Merchant.

16. MATTERS AFFECTING PERFORMANCE

If at any time, the carriage contemplated by this Bill of Lading is or ... Carrier, is likely to be affected by any hindrance or ... whether ...

TERMS AND CONDITIONS

tents or manner in which Goods are stuffed, stowed and carried within Container, and Carrier does not represent quantity, weight, condition, marks or contents of such contents inserted in Bill of Lading to be accurate or stuffed, stowed and secured to be proper.

c) (1) The Terms and Conditions of this Bill of Lading shall govern Carrier's responsibility in connection with or arising out of the supply of a Container to Merchant, whether supplied before or after Goods are received by the Carrier or delivered to Merchant.

2) If the Container has been stuffed by or on behalf of Merchant.

(A) Carrier shall not be liable for loss of or damage to the Goods;

(i) caused by manner in which Container has been stuffed,

(ii) caused by unsuitability of Goods for carriage in Containers;

(iii) caused by unsuitability or defective condition of Container

provided that where Container has been supplied by or on behalf of the Carrier, this paragraph (iii) shall only apply if the unsuitability or defective condition arose

a) without any want of due diligence on Carrier's part to

b) would have been apparent upon reasonable inspection by Merchant at or prior to time Container was stuffed;

(iv) if Container is not sealed at commencement of Carriage except where Carrier has agreed to seal Container.

(B) Merchant shall defend, indemnify and hold Carrier harmless against any loss, damage, claim, liability or expense whatsoever arising from one or more of matters covered by (A) above except for (A) (ii) (a).

(3) Where Carrier is instructed to provide a Container, in absence of a written request to contrary, Carrier is not under an obligation to provide a Container of particular type or quality.

(d) When a Container is to be stripped by or on behalf of the Merchant, Merchant shall promptly strip, or cause to be stripped, Container and take delivery of its contents, irrespective of condition of Goods. Further, Merchant shall be and remain liable for any loss, damage or expense of whatsoever nature arising or resulting from stripping howsoever occurring, including but not limited to loss or damage to the Goods, Container, Vessel or conveyance or to other cargo, property or persons, whether such loss or damage is then evident or later manifests itself.

(e) When any Container utilized is owned or leased by Carrier, and not returned to Carrier's custody, Merchant shall be and remain liable, at tariff rates, for any delay beyond time allowed for the use of such Container, and for any loss, damage or expense incurred by Carrier as a result of failure to return the Container to Carrier in the same sound condition and state of cleanliness as when received by or on behalf of Merchant, even if a condition caused by Goods does not then manifest itself and/or results in loss, damage or expense at a subsequent time.

(f) Merchant agrees to be responsible for all expenses of any nature incurred while the Goods and Containers are in the custody of Carrier or any Participating carrier, their agents or servants, including but not limited to repairs, reconditioning, demurrage, detention, taxes and taxes, civil or criminal, and whether charged to the Goods or Containers or levied upon Carrier, Vessel, other conveyance, Participating carrier, its conveyance, their agents or servants, which result for the acts or omissions to act on part of Merchant, its agents or servants, or third-parties for whom Carrier, Participating carrier, their agents or servants, are not responsible, and to submit to jurisdiction of any court, tribunal or other body before whom Carrier may be brought.

(g) Carrier's prior written consent in writing required for dangerous or hazardous Goods, which must be distinctly marked as such on outside of Goods and container.

(h) Merchant warrants that it has complied with all statutes, ordinances, regulations and requirements of Customs, Port and any other Authorities relative to the Goods, Containers, documentation and any other matters affecting or in any way relating thereto.

9. CONTAINERIZED CARGO

Goods may be stowed by Carrier in Containers, and Containers, whether stowed by Carrier or received fully stowed, may be carried on or under deck without notice, and Merchant expressly agrees that cargo stowed in a Container and carried on deck is considered for all legal purposes to be cargo stowed under deck. Goods stowed in Containers on deck shall be subject to the legislation referred to in Clause 3, hereof and will contribute and/or receive compensation in General Average, as the case may be.

10. CONTAINERS WITH HEATING OR REEFER APPARATUS

Containers with temperature or atmosphere-controlled apparatus for heating, refrigeration or otherwise will not be furnished unless expressly contracted for in writing at time of booking and, when furnished, may entail increased Charges. In absence of an express request, it shall be conclusively presumed that use of a dry container is appropriate for the Goods.

Merchants must provide Carrier with desired temperature range when delivering Containers to Carrier, and Carrier to exercise due diligence to maintain the temperature within a reasonable range while in its custody or control. The Carrier does not accept any responsibility for the functioning of temperature or atmosphere-controlled Containers not owned or leased by Carrier or related companies.

11. DECK CARGO

Deck cargo (except that carried in Containers on deck) and live animals are received and carried solely at Merchant's risk (including accident or mortality of animals), and the Carrier will not at any event be liable for any loss or damage to or in respect of such cargo, however caused or occasioned by negligence, fault or default of the Carrier, or for any other cause whatsoever even if loss or damage is due to the fault of the Carrier, any warranty of seaworthiness in the premises being hereby waived. Except as may be otherwise provided, such shipments shall be deemed Goods and shall be subject to all Terms and Conditions of this Bill of Lading.

12. METHODS AND ROUTES OF TRANSPORTATION; LIBERTIES

Without derogating from the Carrier's obligation to carry the Goods to the Port of Discharge subject to these Terms and Conditions

[illegible] of any kind to Vessel, any part of Good[illegible] but not limited to strikes and other labour [illegible] mencement of transportation or thereafter [illegible] incurred), Carrier may, without prior written [illegible] which is always to act reasonably, consider [illegible] taken or to be taken and the nature of Goods

a) carry Goods or Containers or other [illegible] Place of Delivery, whichever applicable, by th[illegible] route; or

b) forward or transship the Goods, van[illegible] retain them on board, warehouse or devanned, [illegible] of Discharge or any other reasonable point, [illegible] nature of Goods; or

c) elect to terminate the transportation an[illegible] packages and devan contents of any Container[illegible] Merchant to take delivery and, upon failure to [illegible] and expense of Merchant and Goods.

Under any of the foregoing options, C[illegible] Charges and any additional freight and for s[illegible] on behalf of Carrier, all of which shall be due [illegible] have a lien on the Goods for same.

Notice of Carrier's election and disposition [illegible] signee, receiver, holder of this Bill of Lading, c[illegible] sion of the Goods, insofar as they are identifia[illegible] their names and addresses.

All actions taken by Carrier hereunder shal[illegible] templated carriage and not be an unreasonable

17. LIMITATION OF LIABILITY

Except as otherwise provided in this Clau[illegible] pulsorily applicable law, including, if relevant, [illegible] Goods by Sea Act 1991, the Carrier's liability [illegible] per package or per customary freight unit or [illegible] higher than $500 per package or per customa[illegible] Merchant before shipment and inserted in Bill [illegible] In such case, if the limitation amount shall exc[illegible] shall not exceed declared value.

As to cargo shipped in bulk, the limitation [illegible] 1304(5) of COGSA, or such other legislation, [illegible] no event shall anything herein be construed a[illegible] in bulk.

If, on the reverse side hereof, the parties [illegible] a lump sum freight is assessed, in either event [illegible] Container even if furnished by the Carrier. If, [illegible] reverse side hereof, where a Container is not [illegible] Container shall conclusively be deemed a sum [illegible] $500. In the event this provision is held invalid [illegible] tion shall apply, it shall nevertheless apply duri[illegible] not limited to, prior to loading and subsequent

Where compulsorily applicable legislation [illegible] package or customary freight unit, such lesse[illegible] contained shall be construed as a waiver of a h[illegible]

18. NOTICE OF CLAIM; TIME FOR SUIT

As to any loss or damage presumed to ha[illegible] responsibility, if notice of loss or damage or c[illegible] charge/removal of Goods by Merchant or, if los[illegible] consecutive days thereafter, a presumption of [illegible] of such Goods shall arise.

In any event, the Carrier and any Participat[illegible] bility of whatsoever nature unless suit is brought [illegible] or date when Goods should have been delivered [illegible] arise during a part of the transport which is sub[illegible] (in some jurisdictions 9 months) for contained [illegible] Carrier or Participating Carrier shall cease to [illegible] period

Suit shall not be deemed "brought" unless [illegible] Participating carrier by service of process or by [illegible] provision should be held invalid during that pe[illegible] apply, it shall nevertheless less apply during al[illegible] brought to or to [illegible]

a equity.

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Receipt or Place of Delivery is set forth hereon and is an ...ed
tion basis), Carrier will pro ide transportation to/from sea termi-
s, which may well involve transport by rail and, notwithstanding
3, but always subject to Clause 3, hereof, Carrier shall be liable
ratsoever nature and however arising to the following extent.

he loss or damage arose during a part of the carriage made subject
on or Protocols amending said Rules, as set forth in Clause 3,
all apply; or
loss or damage not falling within a) above but concerning which
ate or subdivision thereof contains compulsorily applicable pro-
oved if Merchant had made a separate and direct contract with
arrier relative to a particular stage of transport wherein the loss
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ing carrier's contract of carriage, then Carrier shall be entitled
nunities, exemptions, limitations of and exonerations from lia-
accorded under such Participating carrier's contract of car-
law, provided however, that nothing contained herein shall be
rrier of any rights, defences and immunities or an increase of
ations of or exonerations from liability under this Bill of Lading.
ft or laws applicable or relating thereto.
A is compulsorily applicable or is made applicable by this Bill
for loss of or damage to the Goods shall not in any event
kilo of gross weight of the Goods lost or damaged.

ENEFICIARIES

entitled to sub-contract on any terms the whole or any part of
ding, storing, warehousing, handling and any and all duties
d in relation to the Goods or Containers or other packages or

agreed that if it should be adjudged that any person or entity
he Carrier is under any responsibility with respect to the Goods
ss of the port or place where any loss or damage shall occur
her the Goods covered hereby or any other goods are being
ectly or indirectly during any handling, and even if the Goods
ed on tree in, stowed and/or free out terms, all exemptions,
tions from liability provided by law or by the terms and
vailable to all agents, servants employees, representatives, all
d) carriers and all stevedores, terminal operators, warehouse-
rmen, carpenters, ship cleaners, surveyors and all independ-
r, in contracting for the foregoing exemptions, limitations of
ty, the Carrier is acting as agent and trustee for and on behalf
ave, all of whom shall to this extent be deemed to be a party
y this Bill of Lading, regardless for whom acting or by whom
ways understood that said beneficiaries are not entitled to any
s, limitations of or exonerations from liability than those that
ll of Lading in any given situation.
s to procure such services as necessary and shall have the
select any mode of land, sea or air transport and to arrange
; to accomplish the total or any part of the carriage from Place
y, except as may be otherwise provided herein.
the Carrier shall have power to waive or vary any of the terms
variation is in writing and is specifically authorized or ratified
ector of the Carrier having actual authority to bind the Carrier

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n owning or entitled to the possession of the Goods and this

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further, either at all or without incurring additional expense,
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to continue the carriage or store the Goods which storage
due delivery hereunder. The Merchant shall indemnify the
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...

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all cargo interests identified in Bill of Lading otherwise
nterest in Goods of its intention to take such step(s).

RESPONSIBILITY OF MERCHANT AND GOODS

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weight, load and count". Merchant agrees that Carrier has
ing quantity, weight, condition, identity or existence of con-

Containers to Carrier, and Carrier to exercise due diligence to maintain the temperature within a reasonable range while in its custody or control. The Carrier does not accept any responsibility for the functioning of tempera... or atmosphere controlled Containers not owned or leased by Carrier or related companies.

11. DECK CARGO

Deck cargo (except that carried in Containers on deck) and live animals are received and carried entirely at Merchant's risk (including accident or inability of animals), and the Carrier will not in any event be liable for any loss or damage to or from which he is exempt, immune or exonerated by applicable law, or from any other cause whatsoever not due to the fault of the Carrier, any warranty of seaworthiness at the premises being hereby waived. Except as may be otherwise provided, such shipments shall be deemed Goods and shall be subject to all Terms and Conditions of this Bill of Lading.

12. METHODS AND ROUTES OF TRANSPORTATION; LIBERTIES

Without derogating from the Carrier's obligation to carry the Goods to the Port of Discharge subject to these Terms and Conditions, with respect to the Goods or Containers or other packages, the Carrier may at any time and without notice to the Merchant:

a) use any means of transport (water, land and/or air) or storage whatsoever;

b) transship or carry on another vessel or conveyance or by any other means of transport than that named on the reverse side hereof;

c) carry Goods on or under deck at its option; -

d) proceed by any route at its sole and absolute discretion and whether the nearest, most direct, customary or advertised route or in or out of geographical rotation;

e) proceed to or stay at any place whatsoever once or more often and in any order or omit calling at any port, whether scheduled or not;

f) discharge and/or store at any place whatsoever, ashore or afloat, in the open or covered;

g) proceed with or without pilots;

h) carry livestock, contraband, explosives, munitions, warlike stores, dangerous or hazardous Goods or Goods of any and all kinds;

i) drydock or stop at any unscheduled port for bunkers, repairs or for any purpose whatsoever;

j) comply with any orders, directions or recommendations given by any government or authority or by any person or body acting or purporting to act with the authority of any government or authority or having under the terms of the insurance on the vessel or other conveyance employed by the Carrier the right to give such orders, directions or recommendations.

k) take any other steps or precautions as may appear reasonable to the Carrier under the circumstances.

The liberties set out in subdivisions a) through k) may be invoked for any purpose whatsoever even if not connected with the carriage covered by this Bill of Lading, and any action taken or omitted to be taken, and any delay arising therefrom, shall be deemed to be within the contractual and contemplated carriage and not be an unreasonable deviation.

In no circumstance whatsoever shall the Carrier be liable for direct, indirect or consequential loss or damage caused by delay.

13. DELIVERY

If delivery of the Goods or Containers or other packages or any part thereof is not taken by the Merchant when and where and at such time and place as the Carrier is entitled to have the Merchant take delivery, they shall be considered to have been delivered to the Merchant, and the Carrier may, at its option, subject to its lien and without notice, elect to have same remain where they are or sent to a warehouse or other place, wharf or devanned, always at the risk and expense of the Merchant and Goods.

In South America and Caribbean areas (that is, at those specific localities where the Hamburg Rules are compulsorily applicable) it is hereby agreed that the time for delivery of the goods shall be six (6) months from the date of shipment.

14. CHARGES, INCLUDING FREIGHT

The Charges payable hereunder have been calculated on the basis of particulars furnished by or on behalf of the Merchant. The Carrier shall, at any time, be entitled to inspect, reweigh, remeasure or revalue the contents and, if any of the particulars furnished by the Merchant are found to be incorrect, the Charges shall be adjusted accordingly, and the Merchant shall be responsible to pay the correct Charges and all expenses incurred by the Carrier in checking said particulars or any of them.

Charges shall be deemed earned on acceptance of the Goods or Containers or other packages for shipment by the Carrier and shall be paid by the Merchant in full, without any offset, counterclaim or deduction, cargo and/or vessel or other conveyance lost or not lost, and shall be non-returnable in any event.

The Merchant shall remain responsible for all Charges, regardless whether the Bill of Lading be marked, in words or symbols, "Prepaid", "To be Prepaid" or "Collect".

In arranging for any services with respect to the Goods, the Carrier shall be considered the exclusive agent of the Merchant for all purposes, and any payment of Charges to other than the Carrier shall not, in any event, be considered payment to the Carrier.

The Merchant shall defend, indemnify and hold the Carrier, any Participating Carrier, their agents and servants, harmless from and against all liability, loss, damage and expense which may be sustained or incurred by the Carrier relative to the above.

15. CARRIER'S LIEN

Carrier shall have a lien on Goods and any Charges and documents relating thereto for all sums due under this contract or any other contract or undertaking to which Merchant (as defined herein) was party or otherwise involved, which lien shall also extend to General Average contributions, salvage and costs of recovering such sums, including attorney fees, and shall survive delivery. Such lien may be enforced by Carrier by public or private sale at expense of and without notice to Merchant.

16. MATTERS AFFECTING PERFORMANCE

If at any time, the carriage contemplated by this Bill of Lading is, or in the judgment of Carrier, is likely to be affected by any hindrance or ... delay (whether or not existing

TERMS AND CONDITIONS

er in which Goods are stuffed, stowed and carried within Container, and not represent quantity, weight, condition, stowage or existence of such ted in Bill of Lading to be accurate or stuffing, stowing and securing to be

Terms and Conditions of this Bill of Lading shall govern Carrier's responsi- ction with or arising out of the supply of a Container to Merchant, whether e or after Goods are received by the Carrier or delivered to Merchant.

: Container has been stuffed by or on behalf of Merchant,
shall not be liable for loss of or damage to the Goods;
sed by manner in which Container has been stuffed,
sed by unsuitability of Goods for carriage in Containers;
sed by unsuitability or defective condition of Container
where Container has been supplied by or on behalf of the Carrier, this para only apply if the unsuitability or defective condition arose
ot any want of due diligence on Carrier's part or
t have been apparent upon reasonable inspection by Merchant at or prior ner was stuffed;
ontainer is not sealed at commencement of Carriage except where Carrier seal Container.

It shall defend, indemnify and hold Carrier harmless against any loss, dam- ility or expense whatsoever arising from one or more of matters covered by; pt for (A) (a) (a).

Carrier is instructed to provide a Container, in absence of a written request rier is not under an obligation to provide a Container of particular type or

Container is to be stripped by or on behalf of the Merchant, Merchant shall or cause to be stripped, Container and take delivery of its contents, pre- sition of Goods. Further, Merchant shall be and remain liable for any loss, ense of whatsoever nature arising or resulting from stripping howsoever during but not limited to loss or damage to the Goods, Container, Vessel or to other cargo, property or persons, whether such loss or damage is then manifests itself.

ny Container utilized is owned or leased by Carrier, and until returned to y, Merchant shall be and remain liable, at tariff rates, for any delay beyond the use of such Container, and for any loss, damage or expenses incurred result of failure to return the Container to Carrier in the same sound con- of cleanliness as when received by or on behalf of Merchant, even if a d by Goods does not then manifest itself and/or results in loss, damage or bsequent time.

: agrees to be responsible for all expenses of any nature incurred while the arriers are in the custody of Carrier or any Participating carrier, their agents uding but not limited to repairs, reconditioning, demurrage, detention, taxes r criminal, and whether charged to the Goods or Containers or levied upon other conveyance. Participating carrier, its conveyance, their agents or ser- ult for the acts or omissions to act on part of Merchant, its agents or ser- arties for whom Carrier, Participating carrier, their agents or servants, are and to submit to jurisdiction of any court, tribunal or other body before ay be brought.

prior written consent in writing required for dangerous or hazardous st be distinctly marked as such on outside of Goods and container. t warrants that it has complied with all statutes, ordinances, regulations ts of Customs, Port and any other Authorities relative to the Goods. mentation and any other matters affecting or in any way relating thereto.

ED CARGO

be stowed by Carrier in Containers, and Containers, whether stowed by ed fully stowed, may be carried on or under deck without notice, and sly agrees that cargo stowed in a Container and carried on deck is con- al purposes to the cargo stowed under deck. Goods stowed in Containers subject to the legislation referred to in Clause 3, hereof and will contribute mpensation in General Average, as the case may be.

S WITH HEATING OR REEFER APPARATUS

ith temperature or atmosphere-controlled apparatus for heating, refrig- se will not be furnished unless expressly contracted for in writing at time hen furnished, may entail increased Charges. In absence of an express e conclusively presumed that use of a dry container is appropriate for the

ust provide Carrier with desired temperature range when delivering ier, and Carrier to exercise due diligence to maintain the temperature de range while in its custody or control. The Carrier does not accept any he functioning of temperature or atmosphere-controlled Containers not by Carrier or related companies.

)

xcept that carried in Containers on deck) and live animals are received at Merchant's risk (including accident or mortality of animals), and the any event be liable for any loss or damage and or liken which he is, r exonerated by applicable law, or trade usage or liken which he is, the Carrier, any warranty of seaworthiness or the premises being here- as may be otherwise provided, such shipments shall be deemed Goods ct to all Terms and Conditions of this Bill of Lading.

D ROUTES OF TRANSPORTATION; LIBERTIES

ating from the Carrier's obligation to carry the Goods to the Port or

tage of any kind to Vessel, any part of Goods or Containers or other packages including but not limited to slaves and other labour obstructions, whether during) before commencement of transportation or thereafter arising (whether or not Carriage has commenced), Carrier may, without prior written notice to Merchant, and at its sole discretion, which is always to act reasonably, considering the circumstances prompting the action taken or to be taken and the nature of Goods in question:

a) carry Goods or Containers or other packages to contracted Port of Discharge or Place of Delivery, whichever applicable, by the usual or intended route or by an alternate route; or

b) forward or transship the Goods, manned or devanned, to intended destination or return them on board, manned or devanned, until the return of Vessel to Port of Loading or of Discharge or any other reasonable point, always with regard to the circumstances and nature of Goods; or

c) elect to terminate the transportation and discharge the Goods or Containers or other packages and devan contents of any Container owned or leased by Carrier and require the Merchant to take delivery and, upon failure to do so, may warehouse the Goods at the risk and expense of Merchant and Goods.

Under any of the foregoing options, Carrier shall nevertheless be entitled to full Charges and any additional freight and for storage and all other expenses incurred by or on behalf of Carrier, all of which shall be due and owing from Merchant, and Carrier shall have a lien on the Goods for same.

Notice of Carrier's election and disposition of Goods shall be sent to the shipper, consignee, receiver, holder of the Bill of Lading, owner of Goods or person entitled to possession of the Goods, insofar as they are identified in the Bill of Lading or Carrier is aware of their names and addresses.

All actions taken by Carrier hereunder shall be deemed within the contractual and contemplated carriage and not be an unreasonable deviation.

17. LIMITATION OF LIABILITY

Except as otherwise provided in this Clause and except as provided under any compulsorily applicable law, including, if considerably applicable, the Australian Carriage of Goods by Sea Act 1991, the Carrier's liability shall be limited to U.S. $500 limited money per package or per customary freight unit unless the nature of the cargo and valuation higher than $500 per package or per customary freight unit shall have been declared by Merchant before shipment and inserted in Bill of Lading, and extra freight paid if required. In such case, if the limitation amount shall exceed declared value, Carrier's liability, if any, shall not exceed declared value.

As to cargo shipped in bulk, the limitation applicable shall be that provided in Section 1304(5) of COGSA, or such other legislation, convention or law as may be applicable. In no event shall anything herein be construed as a waiver of limitation as to cargo shipped in bulk.

If, on the reverse side hereof, the parties characterize the Container as a package or a lump sum freight is assessed, in either event, liability shall be limited to U.S. $ 500 per Container even if furnished by the Carrier. Notwithstanding the characterization on the reverse side hereof, where a Container is not furnished and/or stuffed by Carrier, each Container shall conclusively be deemed a single package and Carrier's liability limited to $500. In the event this provision is held invalid during a period when compulsory legislation shall apply, it shall nevertheless apply during all non-compulsory periods such as, but not limited to, prior to loading and subsequent to discharge from the Vessel.

Where compulsorily applicable legislation provides a limitation lesser than $500 per package or customary freight unit, such lesser limitation shall apply and nothing herein contained shall be construed as a waiver of a limitation less than $500.

18. NOTICE OF CLAIM; TIME FOR SUIT

As to any loss or damage presumed to have occurred during the Carrier's period of responsibility, if notice of loss or damage or claim is not given before or at time of discharge/removal of Goods by Merchant or, if loss or damage is not then apparent, within 3 consecutive days thereafter, a presumption of discharge/delivery in good order by Carrier of such Goods shall arise.

In any event, the Carrier and any Participating carrier shall be discharged from all liability of whatsoever nature unless suit is brought within 1 year after delivery of the Goods or date when Goods should have been delivered, provided however, that if any claim should arise during a part of the transport which is subject by applicable law to a shorter period (or some jurisdictions by invalid) for contractual period of suit, any liability whatsoever of Carrier or Participating carrier shall cease unless suit is brought within such shorter period.

Suit shall not be deemed "brought" unless jurisdiction is obtained over Carrier or Participating carrier by service of process or by an agreement to appear. In the event this provision should be held invalid during that period in which compulsory legislation shall apply, it shall nevertheless less apply during all non-compulsory periods such as, but not

...receipt and carriage on Containers on deck) and live animals are received ...y at Merchant's risk (including accident or inability of animals), and the ... any event for liability for any loss or damage (or ... which by or ... ...or consequential by applicable law, or from any other cause ... whatsoever not ... of the Carrier, any warranty of seaworthiness at the premises being here... ...or as may be otherwise provided, such shipments shall be deemed Goods ...ject to all Terms and Conditions of this Bill of Lading.

...ND ROUTES OF TRANSPORTATION; LIBERTIES

...epting from the Carrier's obligation to carry the Goods to the Port of ...t to these Terms and Conditions, with respect to the Goods or Containers ...s, the Carrier may at any time and without notice to the Merchant:
...eans of transport (water, land and/or air) or storage whatsoever;
...or carry on another vessel or conveyance or by any other means of trans... ...ried on the reverse side hereof;
...ds on or under deck at its option;
...y any route in its sole and absolute discretion and whether the nearest, ...mary or advertised route or on or out of geographical rotation;
...o or stay at any place whatsoever once or more often and in any order or ...y port, whether scheduled or not;
...ise store at any place whatsoever, ashore or afloat, in the open or cov...

...ith or without pilots;
...attack, contraband, explosives, munitions, warlike stores, dangerous or ...ous Goods of any and all kinds;
...stop at any unscheduled port for bunkers, repairs or for any purpose

...any orders, direction or recommendation given by any government or ...y person or body acting or purporting to act with the authority of any gov... ...ity or having under the terms of the insurance on the vessel or other con... ...d by the Carrier the right to give such orders, directions or recommen...

...ther steps or precautions as may appear reasonable to the Carrier under ...s.
...set out in subdivisions a) through k) may be invoked for any purpose ...l not connected with the carriage covered by this Bill of Lading, and any ...mitted to be taken, and any delay arising therefrom, shall be deemed to ...nactual and contemplated carriage and not be an unreasonable deviation.

...ance whatsoever shall the Carrier be liable for direct, indirect or consequ... ...mage caused by delay.

...the Goods or Containers or other packages or any part thereof is not ...ilsed when and where and at such time and place as the Carrier is enti... ...Merchant take delivery, they shall be considered to have been delivered ...and the Carrier may, at its option, subject to its lien and without notice, ...e remain where they are or sent to a warehouse or other place, wholly ...ys at the risk and expense of the Merchant and Goods.
...ica and Caribbean areas (that is, in those specific localities where the ...e compulsorily applicable) it is hereby agreed that the time for delivery ...be six (6) months from the date of shipment.

...CLUDING FREIGHT

...ayable hereunder have been calculated on the basis of particulars fur... ...behalf of the Merchant. The Carrier shall, at any time, be entitled to ...measure or revalue the contents and, if any of the particulars furnished ...e found to be incorrect, the Charges shall be adjusted accordingly, and ...be responsible to pay the correct Charges and all expenses incurred ...ecking said particulars or any of them.
...so deemed earned on acceptance of the Goods or Containers or other ...ent by the Carrier and shall be paid by the Merchant in full, without any ...or deduction, cargo and/or vessel or other conveyance lost or not lost, ...turnable in any event.
...shall remain responsible for all Charges, regardless whether the Bill of ...ng words or symbols, "Prepaid", "To be Prepaid" or "Collect".
...any services with respect to the Goods, the Carrier shall be entitled ...agent of the Merchant for all purposes, and any payment of Charges to ...or shall not, in any event, be considered payment to the Carrier.
...shall defend, indemnify and hold the Carrier, any Participating Carrier, ...ervants, harmless from and against all liability, loss, damage and ...be sustained or incurred by the Carrier relative to the above.

...N

...es a lien on Goods and any Charges and documents relating thereto ...nder this contract or any other contract or undertaking to which ...Merchant was party or otherwise involved, which lien shall also extend ...contributions, salvage and cost of recovering such sums, whether or ...ot survive delivery. Such lien may be enforced by Carrier by public or ...ale or and without notice to Merchant.

...CTING PERFORMANCE

...e carriage contemplated by this Bill of Lading or, at the option of ...allow but by any breakage or ... ...ession, delay, deficiency or misdelivery ...

...of time which Goods should have been delivered, provided however, that if any claim should ...arise during a part of the transport which is subject to applicable law to a shorter period ...(in some jurisdictions 9 months) ... ...extend period of suit, any liability whatsoever of ...Carrier or Participating Carrier ... ...unless suit is brought within such shorter ...period.

Suit shall not be deemed "brought" unless jurisdiction is obtained over Carrier or Participating carrier by service of process or by an agreement to appear. In the event this provision should be held invalid during that period in which compulsory legislation shall apply, it shall nevertheless less apply during all non-compulsory periods such as, but not limited to, prior to loading and subsequent to discharge from Vessel.

All documents with exception of legal process may be served upon Carrier by leaving it at the principal Agent's office of Carrier in either the country of loading or country of discharge of the Goods.

19. FIRE

Neither the Carrier nor any corporation owned by, subsidiary to or associated or affiliated with Carrier shall be liable to answer for or make good any loss or damage to Goods or Containers or other packages (whether) at any time, and even though before loading on or after discharge from the Vessel or other conveyance, by reason or by means of any fire whatsoever, unless caused by its personal design or neglect, or by its actual fault or privity. In any case where this exemption is not permitted by law, and no other defences afforded by this Bill of Lading and/or applicable legislation or convention would exonerate Carrier from liability, Carrier shall not be liable for loss or damage by fire unless shown to have been caused by Carrier's negligence.

20. BOTH TO BLAME COLLISION CLAUSE

If the Vessel comes into collision with another vessel or object as a result of the fault or negligence of the other vessel or object or any act, neglect or default of the Carrier, Master, crew, pilot, agents or servants of the Carrier in the navigation or in the management of the Vessel, Merchant will indemnify Carrier against all loss or liability to the other or non-carrying vessel or her owners insofar as it represents any loss, damage or claim whatsoever by, of or to the Merchant, paid or payable by the other or non-carrying vessel or her owners to the Merchant and set-off, recouped or recovered by the other or non-carrying vessel or her owners as part of their claim against the carrying Vessel or Carrier.

The foregoing provisions shall also apply where the owners, operators or those in charge of any vessel or vessels or object other than, or in addition to, the colliding vessels or objects are at fault in respect of a collision, contact, stranding or other accident.

This provision to remain in effect in other jurisdictions even if unenforceable in United States courts.

21. GENERAL AVERAGE

General Average shall be adjusted, stated and settled according to York-Antwerp Rules 1974, as amended, at any place at option of Carrier whether declared by Carrier or any person or vessel (other than the merchant). In the event of accident, danger, damage or disaster, before or after commencement of voyage, from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Carrier is not responsible by statute, contract or otherwise, Merchant shall contribute with Carrier in General Average to payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred. Merchant shall give such cash deposit or other security as Carrier may deem sufficient to cover estimated General Average contribution before delivery if the Carrier requires, or, if Carrier does not so require, within three months of delivery of Goods, whether or not at time of delivery Merchant had notice of Carrier's lien. Carrier shall be under no obligation to exercise any lien for General Average contribution due Merchant. If a salving ship is owned or operated by Carrier, salvage shall be paid for as fully and in same manner as if such salving ship was owned or operated by strangers. Cargo's contribution in General Average shall be paid even when such Average is result of fault, neglect or error of the Master, pilot, officers or crew. Merchant expressly renounces any and all codes, statutes, laws or regulations which might otherwise apply similar as applicable law permits.

22. JURISDICTION

Any suit to recover on any claim for loss or damage to the Goods carried hereunder, or to any other claims as referred to in Clause 5, hereof, shall be brought only in the country where the Goods are received for transportation or where this Contract calls for delivery, the country to be chosen by the party making the claim. The place of litigation shall be as follows:

In the United States - at New York (U.S. District Court, Southern District of New York) In Canada - at Montreal, In New Zealand - at Auckland, In Australia - at Sydney.

Alternatively, if all parties agree, the claim may be referred to arbitration at a place to be agreed upon by the parties.

23. NON-WAIVER AND SEPARABILITY

Nothing in this Bill of Lading shall operate to deprive the Carrier of any statutory protection or any defence, immunity, exemption, limitation of or exoneration from liability conferred in the laws of the United States, Australia or of any other country whose laws may be applicable. The terms and Conditions of this Bill of Lading including all the terms and conditions of the Carrier's applicable tariff or tariffs as incorporated herein by virtue of Clause 2 hereof shall be severable and if any part or term hereof shall be held invalid such invalidity shall not affect the validity or enforceability of any other part or term hereof.

HAMBURG SUD/COLUMBUS LINES
BILL OF LADING

TERMS AND CONDITIONS

1. DEFINITIONS.

a) "Carrier" means Columbus Line, which is the trade name used by Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft Eggert & Amsinck, Ost-West-Strallo Hamburg Germany, the Carrier named on the face side hereof, the vessel, her owner, operator, demise charterer, time charterer, voyage charterer, space or slot charterer, subcarrier and substitute carrier, whether acting as carrier or bailee.

b) "Charges" means freight, deadfreight, demurrage and all expenses and money obligations incurred and payable by the Merchant.

c) "Container" means any container, van, trailer, flatbed, transportable tank, railroad box vehicle, flat, pallet, skid, platform, cradle, sling-load or any similar article of transport.

d) "Goods" means the cargo received from the shipper and described on the face side hereof, and any Container not supplied by or on behalf of the Carrier.

e) "Merchant" means the shipper, consignee, receiver, holder of this Bill of Lading, owner of the cargo or person entitled to the possession of the cargo and the servants and agents of any of these, all of whom shall be jointly and severally liable to the Carrier for the payment of all Charges, and for the performance of the obligations of any of them under this Bill of Lading.

f) "On Board" or similar words endorsed on this Bill of Lading mean that in a Port to Port movement, the Goods have been loaded on board the Vessel or are in the custody of the ocean carrier, and in the event of intermodal transportation, if the originating carrier is an inland carrier, means that the

Goods have been loaded on board rail cars or another mode of transport at the Place of Receipt or are in the custody of a Participating carrier and en route to the Port of Loading named on the reverse side

g) "Participating carrier" means any other carrier by water, land or air, performing any portage of the carriage, whether acting as sub-carrier, substitute carrier or bailee

h) "Vessel" means the ocean vessel named on the face side hereof, and any substitute vessel, feedership, barge, or other means of conveyance by water used in whole or in part of the carrier

2 CARRIER'S TARIFFS

Goods carried hereunder are subject to all terms and conditions of Carrier's applicable tariff(s) on file with the Federal Maritime Commission, Interstate Commerce Commission or other regulatory body which governs a particular portion of the carriage and said terms and conditions are hereby incorporated herein as part of the Terms and Conditions of this Bill of Lading. Copies of relevant provisions of applicable tariff(s) are obtainable from Carrier, Federal Maritime Commission, Interstate Commerce Commission or other regulatory body upon request. In the event of any conflict between the terms and conditions of such tariff(s) and the Terms and Conditions of this Bill of Lading, this Bill of Lading shall prevail

3 RESPONSIBILITY; APPLICABLE LEGISLATION

a) The Carrier shall be responsible for the Goods from the time received at the Port of Loading until delivered (or should have been delivered) at the Port of Discharge and also during any previous or subsequent period of carriage performed under this Bill of Lading, subject to the provisions of any legislation compulsorily applicable to this Bill of Lading (1) which gives effect to the Hague Rules contained in the International Convention for the Unification of Certain Rules

Relating to Bills of Lading, dated at Brussels, August 25, 1924, including adaptions thereof, such as the Carriage of Goods by Sea Act of the United States (hereinafter "COGSA") or (2) which gives effect to the said Rules as amended by the Protocols to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, dated at Brussels, February 23, 1968 (the "Visby Amendments") and December 21, 1979 (the "SDR Protocol"), including if compulsorily applicable, the Australian Carriage of Goods by Sea Act, 1991 or (3) where the Hague Rules, adaptions thereof or Hague Visby Amendments (including the SDR Protocol) are not compulsorily applicable, this Bill of Lading shall take effect subject to any national law which may be in force at the Port of Loading or place of issue of the Bill of Lading making the United National Convention on the Carriage of Goods by Sea 1978 (the "Hamburg Rules") compulsorily applicable to this Bill of Lading, in which case this Bill of Lading shall have effect subject to the Hamburg Rules which shall nullify any stipulation derogating therefrom to the detriment of the Merchant. The applicable legislation shall govern during the Carrier's entire period of responsibility. In the absence of compulsorily applicable legislation, COGSA shall govern.

b) The Carrier shall, notwithstanding which legislation is applicable under a) above, be entitled to the benefit of Sections 4281 through 4287 of the Revised Statutes of the United States and amendments thereto, as if the same were expressly set out herein

c) The rights, defences, immunities, exemptions, limitations of and exonerations from liability of whatsoever nature, provided for in this Bill of Lading, or (so far as may be permissible) under statute, shall apply in any action or proceeding brought against the Carrier, whether in contact, tort or equity.

4. THROUGH TRANSPORTATION

When either Place of Receipt or Place of Delivery is set forth herein and is an inland point (Through Transportation basis), Carrier will provide transportation to/from sea terminal and such inland points, which may well involve transport by rail and, notwithstanding anything herein contained, but always subject to Clause 3, hereof, Carrier shall be liable for loss or damage of whatsoever nature and howsoever arising to the following extent, but no further:

a) Upon proof that the loss or damage arose during a part of carriage made subject to Hague Rules legislation or Protocols amending said Rules, as set forth in Clause 3, above, said legislation shall apply; or

b) Upon proof that the loss or damage not falling within a) above but concerning which the law of any country, state or subdivision thereof contains compulsorily applicable provisions and would have applied if Merchant had made a separate and direct contract with Carrier or a Participating carrier relative to a particular stage of transport wherein the loss or damage occurred and received as evidence thereof a particular document required to be issued, then the liability of the Carrier and Participating carrier shall be subject to the provisions of such law.

c) If it should be determined that Carrier bears any responsibility for loss or damage occurring during the custody of the Participating carrier and be subject to law compulsorily applicable to Participating carrier's contract of carriage, then Carrier shall be entitled to all rights, defenses, immunities, exemptions, limitations of and exonerations from liability of whatsoever nature accorded under such Participating carrier's contract of carriage, tariff, and applicable law, provided however, that nothing contained herein shall be deemed a surrender by Carrier of any rights, defenses and immunities or an increase of any of its exemptions, limitations of or exonerations from liability under this Bill of Lading, the

Carrier's applicable tariff or laws applicable or relating thereto.

d) Except where COGSA is compulsorily applicable it is made applicable by this Bill of Lading. Carrier's liability for loss of or damage to the Goods shall not in any event exceed U.S. DLRS 2.50 per kilo of gross weight of the Goods lost or damaged.

5. SUB-CONTRACTING; BENEFICIARIES

a) The Carrier shall be entitled to sub-contract on any terms the whole or any part of the carriage, loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by it in relation to the Goods or Containers or other packages or any other goods.

b) It is understood and agreed that if it should be adjudged that any person or entity other than or in addition to the Carrier is under any responsibility with respect to the Goods or any other goods, regardless of the port or place where any loss or damage shall occur and without regard to whether the Goods covered hereby or any other goods are being handled or are damaged directly or indirectly during any handling, and even if the Goods or other goods are transported on free in, stowed and/or free out terms, all exemptions, limitations of, and exonerations from liability provided by law or by the Terms and Conditions hereof shall be available to all agents, servants, employees, representatives, all Participating (including inland) carriers and all stevedores, terminal operators, warehousemen, crane operators, watchmen, carpenters, ship cleaners, surveyors and all independent contractors whatsoever, in contracting for the foregoing exemptions, limitations of and exonerations from liability, the Carrier is acting as agent and trustee for and on behalf of all persons described above, all of whom shall to this extent be deemed to be a party to the contract evidenced by this Bill of Lading, regardless for whom acting or by whom retained and paid, it being always understood that said beneficiaries are not

entitled to any greater or further exemptions, limitations of or exonerations from liability than those that the Carrier has under this Bill of Lading in any given situation.

c) The Carrier undertakes to procure such services as necessary and shall have the right at its sole discretion to select any mode of land, sea or air transport and to arrange participation by other carriers to accomplish the total or any part of the carriage from Place of Receipt to Place of Delivery, except as may be otherwise provided herein.

d) No agent or servant of the Carrier shall have power to waive or vary any of the terms hereof unless such waiver or variation is in writing and is specifically authorized or ratified in writing by an officer or director of the Carrier having actual authority to bind the Carrier to such waiver or variation.

6. WARRANTY

The Merchant warrants that in agreeing to the Terms and Conditions hereof, he is, or has the authority of, the person owning or entitled to the possession of the Goods and this Bill of Lading.

7. OPTION OF INSPECTION

The Carrier shall be entitled, but not obligated to open any Container at any time and to inspect contents. If it appears that the contents or any part thereof cannot safely or properly be carried or carried further, either at all or without incurring additional expense, Carrier may abandon the transportation and/or take any measures and/or incur any reasonable additional expenses to continue the carriage or store the Goods which storage shall be deemed to constitute due delivery hereunder. The Merchant shall indemnify the Carrier against any reasonable additional Charges so incurred, unless due solely to Carrier's fault.

However, before taking any of the above steps, the Carrier shall, if feasible, make all reasonable attempts to notify all

cargo interests identified in Bill of Lading otherwise known to Carrier to have any interest in Goods of its intention to take such step(s).

8. DESCRIPTION OF GOODS; RESPONSIBILITY OF MERCHANT AND GOODS

a) Neither Carrier, not its agents and servants, shall be liable for, or concluded as to, correctness of any marks, descriptions or other representations furnished or made by or on behalf of Merchant or appearing on the Goods or documents relating thereto.

b) When a Container is stuffed by or on behalf of Merchant, such Container shall be deemed shipped as "Shipper's weight, load and count". Merchant agrees that Carrier has no reasonable means of checking quantity, weight, condition, identity or existence of contents or manner in which Goods are stuffed, stowed and secured within Container, and Carrier does not represent quantity, weight, condition, identify or existence of such contents inserted in Bill of Lading to be accurate or stuffing, stowing and securing to be proper.

c) (1) The Terms and Conditions of this Bill of Lading shall govern Carrier's responsibility in connection with or arising out of the supply of a Container to Merchant, whether supplied before or after Goods are received by the Carrier or delivered to Merchant.

(2) If the Container has been stuffed by or on behalf of Merchant.

(A) Carrier shall not be liable for loss of or damage to the Goods;

(i) caused by manner in which Container has been stuffed,

(ii) caused by unsuitability of Goods for carriage in Containers;

(iii) caused by unsuitability or defective condition of Container provided that where Container has been supplied by or on behalf of the Carrier, this paragraph (iii) shall only apply if the unsuitability or defective condition arose,

(a) without any want of due diligence on Carrier's part or

(b) would have been apparent upon reasonable inspection by Merchant at or prior to time Container was stuffed,

(iv) if Container is not sealed at commencement of Carriage except where Carrier has agreed to seal Container.

(B) Merchant shall defend, indemnify and hold Carrier harmless against any loss, damage, claim, liability or expense whatsoever arising from one or more of matters covered by (A) above except for (A)(iii)(a).

(3) Where Carrier is instructed to provide a Container, in absence of a written request to contrary, Carrier is not under an obligation to provide a Container of particular type or quality.

(d) When a Container is to be stripped by or on behalf of the Merchant, Merchant shall promptly strip, or cause to be stripped, Container and take delivery of its contents, irrespective of condition of Goods. Further, Merchant shall be and remain liable for any loss, damage or expense of whatsoever nature arising or resulting from stripping howsoever occurring, including but not limited to loss or damage to the Goods, Container, Vessel or conveyance or to other cargo, property or persons, whether such loss or damage is then evident or later manifests itself.

(e) When any Container utilized is owned or leased by Carrier, and until returned to Carrier's custody, Merchant shall be and remain liable, at tariff rates, for any delay beyond time allowed for the use of such Container, and for any loss, damage or expense incurred by Carrier as a result of failure to

return the Container to Carrier in the same sound condition and state of cleanliness as when received by or on behalf of Merchant, even if a condition caused by Goods does not then manifest itself and/or results in loss, damage or expense at a subsequent time.

(f) Merchant agrees to be responsible for all expenses of any nature incurred while the Goods and Containers are in the custody of Carrier or any Participating carrier, their agents or servants, including but not limited to repairs, reconditioning, demurrage, detention, fines and taxes, civil or criminal, and whether charged to the Goods or Containers or levied upon Carrier, Vessel, other conveyance, Participating carrier, its conveyance, their agents or servants, which result for the acts or omissions to act on part of Merchant, its agents or servants, or third-parties for whom Carrier, Participating carrier, their agents or servants, are not responsible, and to submit to jurisdiction of any court, tribunal or other body before whom Carrier may be brought.

(g) Carrier's prior written consent in writing required for dangerous or hazardous Goods, which must be distinctly marked as such on outside of Goods and container.

(h) Merchant warrants that it has complied with all statutes, ordinances, regulations and requirements of Customs, Port and any other Authorities relative to the Goods, Containers, documentation and any other matters affecting or in any way relating thereto.

9. CONTAINERIZED CARGO

Goods may be stowed by Carrier in Containers, and Containers, whether stowed by Carrier or received fully stowed, may be carried on or under deck without notice, and Merchant expressly agrees that cargo stowed in a Container and carried on deck is considered for all legal purposes to be cargo stowed under deck. Goods stowed in Containers on deck shall be subject to the legislation referred to in Clause 3,

hereof and will contribute and/or receive compensation in General Average, as the case may be.

10 CONTAINERS WITH HEATING OR REEFER APPARATUS

Containers with temperature or atmosphere-controlled apparatus for heating, refrigeration or otherwise will not be furnished unless expressly contracted for in writing at time of booking and, when furnished, may entail increased Charges. In absence of an express request, it shall be conclusively presumed that use of a dry container is appropriate for the Goods.

Merchants must provide Carrier with desired temperature range when delivering Containers to Carrier, and Carrier to exercise due diligence to maintain the temperature within a reasonable range while in its custody or control. The Carrier does not accept any responsibility for the functioning of temperature or atmosphere-controlled Containers not owned or leased by Carrier or related companies.

11 DECK CARGO

Deck cargo (except that carried in Containers on deck) and live animals are received and carried solely at Merchant's risk (including accident or mortality of animals), and the Carrier will not in any event be liable for any loss or damage for or from which he is exempt, immune or exonerated by applicable law, or from any other cause whatsoever not due to the fault of the Carrier, any warranty of seaworthiness in the premises being hereby waived. Except as may be otherwise provided, such shipments shall be deemed Goods and shall be subject to all Terms and Conditions of this Bill of Lading.

12 METHODS AND ROUTES OF TRANSPORTATION, LIBERTIES

Without derogating from the Carrier's obligation to carry the Goods to the Port of Discharge subject to these Terms and Conditions, with respect to the Goods or Containers or other

packages, the Carrier may at any time and without notice to the Merchant:

(a) use any means of transport (water, land and/or air) or storage whatsoever;

(b) transship or carry on another vessel or conveyance or by any other means of transport than that named on the reverse side hereof;

(c) carry Goods on or under deck at its option;

(d) proceed by any route in its sole and absolute discretion and whether the nearest, most direct, customary or advertised route or in or out of geographical rotation;

(e) proceed to or stay at any place whatsoever once or more often and in any order or omit calling at any port, whether scheduled or not;

(f) devan and/or store at any place whatsoever, ashore or afloat, in the open or covered;

(g) proceed with or without pilots;

(h) carry livestock, contraband, explosives, munitions, warlike stores, dangerous or hazardous Goods or Goods of any all kinds;

(i) drydock or stop at any unscheduled port for bunkers, repairs or for any purpose whatsoever;

(j) comply with any orders, direction or recommendations given by any government or authority or by any person or body acting or purporting to act with the authority of any government or authority or having under the terms of the insurance on the vessel or other conveyance employed by the Carrier the right to give such orders, directions or recommendations.

(k) take any other steps or precautions as may appear reasonable to the Carrier under the circumstances.

The liberties set out in subdivisions a) through k) may be invoked for any purpose whatsoever even if not connected with the carriage covered by this Bill of Lading, and any action taken or omitted to be taken, and any delay arising therefrom, shall be deemed to be within the contractual and contemplated carriage and not be an unreasonable deviation.

In no circumstance whatsoever shall the Carrier be liable for direct, indirect or consequential loss or damage caused by delay.

13. DELIVERY

If delivery of the Goods or Containers or other packages or any part thereof is not taken by the Merchant when and where and at such time and place as the carrier is entitled to have the Merchant take delivery, they shall be considered to have been delivered to the Merchant, and the Carrier may, at its option, subject to its lien and without notice, elect to have same remain where they are or sent to a warehouse or other place, vanned or devanned, always at the risk and expense of the Merchant and Goods.

In South America and Caribbean areas (that is, in those specific localities where the Hamburg Rules are compulsorily applicable) it is hereby agreed that the time for delivery of the goods shall be six (6) months from the date of shipment.

14 CHARGES, INCLUDING FREIGHT

The Charges payable hereunder have been calculated on the basis of particulars furnished by or on behalf of the Merchant. The Carrier shall, at any time, be entitled to inspect, reweigh, remeasure or revalue the contents and, if any of the particulars furnished by the Merchant are found to be incorrect, the Charges shall be adjusted accordingly, and the Merchant shall be responsible to pay the correct Charges and all expenses incurred by the Carrier in checking said particulars or any of them.

Charges shall be deemed earned on acceptance of the Goods or Containers or other packages for shipment by the Carrier and shall be paid by the Merchant in full, without any offset, counterclaim or deduction, cargo and/or vessel or other conveyance lost or not lost, and shall be non-returnable in any event.

The Merchant shall remain responsible for all Charges, regardless whether the Bill of Lading be marked, in words or symbols, "Prepaid" "To be Prepaid" or "Collect".

In arranging for any services with respect to the Goods, the Carrier shall be considered the exclusive agent of the Merchant for all purposes, and any payment of Charges to other than the Carrier shall not, in any event, be considered payment to the Carrier.

The Merchant shall defend, indemnify and hold the Carrier, any Participating carrier, their agents and servants, harmless from and against all liability, loss, damage and expense which may be sustained or incurred by the Carrier relative to the above.

15. CARRIER'S LIEN

Carrier shall have a lien on Goods and any Charges and documents relating thereto for all sums due under this contract or any other contract or undertaking to which Merchant (as defined herein) was partly or otherwise involved, which lien shall also extend to General Average contributions, salvage and cost of recovering such sums, inclusive of attorney fees, and shall survive delivery. Such lien may be enforced by Carrier by public or private sale at expense of and without notice to Merchant.

16. MATTERS AFFECTING PERFORMANCE

If at any time, the carriage contemplated by this Bill of Lading is or, in the judgment of Carrier, is likely to be affected by any hindrance, risk, seizure, delay, difficulty or disadvantage of any kind to Vessel, any part of Goods or

Containers or other packages, including but not limited to strikes and other labour disturbances, whether existing before commencement of transportation or thereafter arising (whether or not carriage has commenced), Carrier may, without prior written notice to Merchant, and at its sole discretion, which is always to act reasonably, considering the circumstances prompting the action taken or to be taken and the nature of Goods in question:

a) carry Goods or Containers or other packages to contracted Port of Discharge or Place of Delivery, whichever is applicable, by the usual or intended route or by an alternate route, or

b) forward or transship the Goods, vanned or devanned, to intended destination or retain them on board, vanned or devanned, until the return of Vessel to Port of Loading or of Discharge or any other reasonable point, always with regard to the circumstances and nature of Goods, or

c) elect to terminate the transportation and discharge the Goods or Containers or other packages and devan contents of any Container owned or leased by Carrier and require the Merchant to take delivery and, upon failure to do so, may warehouse the Goods at the risk and expense of Merchant and Goods.

Under any of the foregoing options, Carrier shall nevertheless be entitled to full Charges and any additional freight and for storage and all other expenses incurred by or on behalf of Carrier, all of which shall be due and owing from Merchant, and Carrier shall have a lien on the Goods for same.

Notice of Carrier's election and disposition of Goods shall be sent to the shipper, consignee, receiver, holder of this Bill of Lading, owner of Goods or person entitled to possession of the Goods, insofar as they are identified in the Bill of Lading or Carrier is aware of their names and addresses.

All actions taken by Carrier hereunder shall be deemed within the contractual and contemplated carriage and not be an unreasonable deviation.

17. LIMITATION OF LIABILITY

Except as otherwise provided in this Clause and except as provided under any compulsorily applicable law, including, if compulsorily applicable, the Australian Carriage of Goods by Sea Act 1991, the Carrier's liability shall be limited to U.S. $500 lawful money per package or per customary freight unit unless the nature of the cargo and valuation higher than $500 per package or per customary freight unit shall have been declared by Merchant before shipment and inserted in Bill of Lading, and extra freight paid if required. In such case, if the limitation amount shall exceed declared value, Carrier's liability, if any, shall not exceed declared value.

As to cargo shipped in bulk, the limitation applicable shall be that provided in Section 130-1(5) of COGSA, or such other legislation, convention or law as may be applicable. In no event shall anything herein be construed as a waiver of limitation as to cargo shipped in bulk.

If, on the reverse side hereof, the parties characterize the Container as a package or a lump sum freight is assessed, in either event, liability shall be limited to U.S. $ 500 per Container even if furnished by the Carrier. Notwithstanding the characterization on the reverse side hereof, where a Container is not furnished and/or stuffed by Carrier, each Container shall conclusively be deemed a single package and Carrier's liability limited to $500. In the event this provision is held invalid during a period when compulsory legislation shall apply, it shall nevertheless apply during all non-compulsory periods such as, but not limited to, prior to loading and subsequent to discharge from the Vessel.

Where compulsorily applicable legislation provides a limitation lesser than $500 per package or customary freight unit, such lesser limitation shall apply and nothing herein

contained shall be construed as a waiver of a limitation less than $500.

18. NOTICE OF CLAIM, TIME FOR SUIT

As to any loss or damage presumed to have occurred during the Carrier's period of responsibility, if notice of loss or damage or claim is not given before or at the time of discharge/removal of Goods by Merchant or, if loss or damage is not then apparent, within 3 consecutive days thereafter, a presumption of discharge/delivery in good order by Carrier of such Goods shall arise.

In any event, the Carrier and any Participating carrier shall be discharged from all liability of whatsoever nature unless suit is brought within 1 year after delivery of the Goods or date when Goods should have been delivered, provided however, that if any claim should arise during a part of the transport which is subject by applicable law to a shorter period (in some jurisdictions 9 months) for commencement of suit, any liability whatsoever of Carrier or Participating carrier shall cease unless suit is brought within such shorter period.

Suit shall not be deemed "brought" unless jurisdiction is obtained over Carrier or Participating carrier by service of process or by an agreement to appear. In the event this provision should be held invalid during that period in which compulsory legislation shall apply, it shall nevertheless less [sic] apply during all non-compulsory periods such as, but not limited to, prior to loading and subsequent to discharge from Vessel.

All documents with exception of legal process may be served upon Carrier by leaving it at the principal Agent's office of Carrier in either the country of loading or country of discharge of the Goods.

19. FIRE

Neither the Carrier nor any corporation owned by, subsidiary to or associated or affiliated with Carrier shall be liable to answer for or make good any loss or damage to Goods or Containers or other packages occurring at any time, and even though before loading on or after discharge from the Vessel or other conveyance, by reason or by means of any fire whatsoever, unless caused by its personal design or neglect, or by its actual fault or privity. In any case where this exemption is not permitted by law, and no other defences afforded by this Bill of Lading and/or applicable legislation or convention would exonerate Carrier from liability, Carrier shall not be liable for loss or damage by fire unless shown to have been caused by Carrier's negligence.

20. BOTH TO BLAME COLLISION CAUSE

If the Vessel comes into collision with another vessel or object as a result of the fault or negligence of the other vessel or object or any act, neglect or default of the Carrier, Master, crew, pilot, agents or servants of the Carrier in the navigation or in the management of the Vessel, Merchant will indemnify Carrier against all loss or liability to the other or non-carrying vessel or her owners insofar as it represents any loss, damage or claim whatsoever by, of or to the Merchant, paid or payable by the other or non-carrying vessel or her owners to the Merchant and set-off, recouped or recovered by the other or non-carrying vessel or her owners as part of their claim against the carrying Vessel or Carrier.

The foregoing provisions shall also apply where the owners, operators or those in charge of any vessel or vessels or object other than, or in addition to, the colliding vessels or objects are at fault in respect of a collision, contract, stranding or other accident.

This provision to remain in effect in other jurisdictions even if unenforceable in United States courts.

21. GENERAL AVERAGE

General Average shall be adjusted, stated and settled according to York-Antwerp Rules 19/4, as amended, at any place at option of Carrier whether declared by Carrier or any person or vessel (other than the merchant). In the event of accident, danger, damage or disaster, before or after commencement of voyage, from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the Carrier is not responsible by statute, contract or otherwise, Merchant shall contribute with Carrier in General Average to payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred. Merchant shall give such cash deposit or other security as Carrier may deem sufficient to cover estimated General Average contribution before delivery if the Carrier requires, or, if the Carrier does not so require, within three months of delivery of Goods, whether or not at time of delivery Merchant had notice of Carrier's lien. Carrier shall be under no obligation to exercise any lien for General Average contribution due Merchant. If a salving ship is owned or operated by Carrier, salvage shall be paid for as fully and in same manner as if such salving ship was owned or operated by strangers. Cargo's contribution in General Average shall be paid even when such Average is result of fault, neglect or error of the Master, pilot, officers or crew. Merchant expressly renounces any and all codes, statutes, laws or regulations which might otherwise apply insofar as applicable law permits.

22. JURISDICTION

Any suit to recover on any claim for loss or damage to the Goods carried hereunder, or to any other goods as referred to in Clause 5, hereof, shall be brought only in the country where the Goods are received for transportation or where this Contract calls for delivery, the country to be chosen by the party making the claim. The place of litigation shall be as follows:

In the United States – at New York (U.S. District Court, Southern District of New York). In Canada – at Montreal. In New Zealand – at Auckland. In Australia – at Sydney.

Alternatively, if all parties agree, the claim may be referred to arbitration at a place to be agreed upon by the parties.

23. NON-WAIVER AND SEPARABILITY

Nothing in this Bill of Lading shall operate to deprive the Carrier of any statutory protection or any defence, immunity, exemption, limitation of or exoneration from liability contained in the laws of the United States, Australia, or of any other country whose laws may be applicable. The Terms and Conditions of this Bill of Lading (including all the terms and conditions of the carrier's applicable tariff or tariffs, incorporated herein by virtue of Clause 2 above shall be separable and if any part or term hereof shall be held invalid, such holding shall not alter the validity or enforceability of any other part or term hereof.

YD 6/95

Consignor
KIRBY ENGINEERING
JAMES N KIRBY PTY LIMITED
286 HORSLEY ROAD
MILPERRA NSW 2214
AUSTRALIA

Consigned to order of
DELPHI SAGINAW STEERING
PLANT 21, HIGHWAY # 31 SOUTH,
ATHENS ALABAMA USA 35612

Notify address
AIR SEA INT'L FORWARDING INC
1155 WEST CHESTNUT STREET
UNION NJ 07083 USA

Place of receipt

Ocean vessel — Port of loading
QUEENSLAND STAR V0030 SYDNEY

Port of discharge — Place of delivery
SAVANNAH HUNTSVILLE RAMP

FBL AU12 - 27086101
NEGOTIABLE FIATA MULTIMODAL TRANSPORT BILL OF LADING
issued subject to UNCTAD/ICC Rules for Multimodal Transport Documents (ICC Publication 481)

INTERNATIONAL CARGO CONTROL PTY LTD
Level 5, Bayview Tower, 1753 Botany Road, Banksmeadow NSW 2019
Telephone: 61 - 2 - 316 8211 Facsimile: 61 - 2 - 316 8664

Marks and numbers	Number and kind of packages	Description of goods	Gross weight	Measurement
TOLU 4694977 24485573	1 20' O/T CONT	STC : 2 PCS PARTIAL SHIPMENT MULTI STATION TRANSFER LINE	16630 KG 70 CMS O/HEIGHT	41.00 M3
TOLU 4692254 24485570	1 20' O/T CONT	STC : 2 PCS PARTIAL SHIPMENT MULTI STATION TRANSFER LINE	19890 KG 52 CMS O/HEIGHT	41.00 M3
TOLU 4687980 24485569	1 20' O/T CONT	STC : 2 PCS PARTIAL SHIPMENT MULTI STATION TRANSFER LINE	19090 KG 73 CMS O/HEIGHT	41.00 M3
TOLU 3226281 24485572	1 20' O/T CONT	STC : 2 PCS PARTIAL SHIPMENT MULTI STATION TRANSFER LINE	16860 KG 71 CMS O/HEIGHT	41.00 M3
TOLU 4521516 24485575	1 20' O/T CONT	STC : 1 PC PARTIAL SHIPMENT MULTI STATION TRANSFER LINE	14100 KG 70 CMS O/HEIGHT	41.00 M3

CONT ON PAGE 2

E.C.N. No
1B972312114SVC

FREIGHT PREPAID

SHIPPED ON BOARD 27/08/97

according to the declaration of the consignor

Declaration of interest of the consignor in timely delivery (Clause 6.2.)

- COPY ONLY -

Declared value for ad valorem rate according to the declaration of the consignor (Clauses 7 and 8)

The goods and instructions are accepted and dealt with subject to the Standard Conditions printed overleaf

Taken in charge in apparent good order and condition, unless otherwise noted herein, at the place of receipt for transport and delivery as mentioned above

One of these Multimodal Transport Bills of Lading must be surrendered duly endorsed in exchange for the goods. In Witness whereof the original Multimodal Transport Bills of Lading all of this tenor and date have been signed in the number stated below, one of which being accomplished the other(s) to be void.

Freight amount	Freight payable at SYDNEY	Place and date of issue SYDNEY 27/08/97
Cargo insurance through the undersigned ☐ not covered ☐ Covered according to attached Policy	Number of Original FBL's 0 ( )	Stamp and signature
For delivery of goods please apply to: AIR SEA INT'L FORWARDING INC 1155 WEST CHESTNUT STREET SUITE 2-B		

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Consignor
KIRBY ENGINEERING
JAMES N KIRBY PTY LIMITED
286 HORSLEY ROAD
MILPERRA NSW 2214
AUSTRALIA

Consigned to order of
DELPHI SAGINAW STEERING
PLANT 21, HIGHWAY # 31 SOUTH,
ATHENS ALABAMA USA 35612

Notify address
AIR SEA INT'L FORWARDING INC
1155 WEST CHESTNUT STREET
UNION NJ 07083 USA

Place of receipt

Ocean vessel — Port of loading
QUEENSLAND STAR V0030 SYDNEY

Port of discharge — Place of delivery
SAVANNAH HUNTSVILLE RAMP

FBL AU12 - 27086101
NEGOTIABLE FIATA MULTIMODAL TRANSPORT BILL OF LADING
issued subject to UNCTAD/ICC Rules for Multimodal Transport Documents (ICC Publication 481)

INTERNATIONAL CARGO CONTROL PTY LTD
Level 5, Bayview Tower, 1753 Botany Road, Banksmeadow NSW 2019
Telephone 61 - 2 - 316 8211 Facsimile 61 - 2 - 316 8664

Marks and numbers	Number and kind of packages	Description of goods	Gross weight	Measurement
TOLU 4692233 24485566	1 20' O/T CONT	STC : 1 PC PARTIAL SHIPMENT MULTI STATION TRANSFER LINE	12030 KG 58 CMS O/HEIGHT	41.00 M3
TRLU 9028644 24485571	1 20' O/T CONT	STC : 2 PCS PARTIAL SHIPMENT MULTI STATION TRANSFER LINE	17170 KG 62 CMS O/HEIGHT	41.00 M3
TOLU 4685050 24485576	1 20' O/T CONT	STC : 1 PC PARTIAL SHIPMENT MULTI STATION TRANSFER LINE	14540 KG 58 CMS O/HEIGHT	41.00 M3
ICSU 4635342 24485574	1 20' O/T CONT	STC : 1 PC PARTIAL SHIPMENT MULTI STATION TRANSFER LINE	12500 KG 55 CMS O/HEIGHT	41.00 M3
TOLU 4656468 2448557	1 20' O/T CONT	STC : 2 PCS PARTIAL SHIPMENT MULTI STATION TRANSFER LINE	12030 KG 57 CMS O/HEIGHT	41.00 M3

END PAGE 2 B/L: 27086101
EXPRESS RELEASE
NO ORIGINAL B/LADING REQUIRED

E.C.N. No
1B972312114SVC

FREIGHT PREPAID

SHIPPED ON BOARD 27/08/97

according to the declaration of the consignor

Declaration of interest of the consignor in timely delivery (Clause 6.2.)

- COPY ONLY -

Declared value for ad valorem rate according to the declaration of the consignor (Clauses 7 and 8)

The goods and instructions are accepted and dealt with subject to the Standard Conditions printed overleaf

Taken in charge in apparent good order and condition, unless otherwise noted herein, at the place of receipt for transport and delivery as mentioned above

One of these Multimodal Transport Bills of Lading must be surrendered duly endorsed in exchange for the goods. In Witness whereof the original Multimodal Transport Bills of Lading all of this tenor and date have been signed in the number stated below, one of which being accomplished the other(s) to be void.

Freight amount	Freight payable at SYDNEY	Place and date of issue SYDNEY 27/08/97
Cargo insurance through the undersigned ☐ not covered ☐ Covered according to attached Policy	Number of Original FBL's 0 ( )	Stamp and signature
For delivery of goods please apply to: AIR SEA INT'L FORWARDING INC 1155 WEST CHESTNUT STREET SUITE 2-B UNION, NEW JERSEY 07083 USA		

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BEST AVAILABLE COPY

Standard Conditio: 992) governing the FIATA MULTIMODAL TRANSP BILL OF LADING

Definitions
- -Freight Forwarder- means the Multimodal Transport Operator who issues this FBL and is named on the face of it and assumes liability for the performance of the multimodal transport contract as a carrier.
- -Merchant- means and includes the Shipper, the Consignor, the Consignee, the Holder of this FBL, the Receiver and the Owner of the Goods.
- -Consignor- means the person who concludes the multimodal transport contract with the Freight Forwarder.
- -Consignee- means the person entitled to receive the goods from the Freight Forwarder.
- -Taken in charge- means that the goods have been handed over to and accepted for carriage by the Freight Forwarder at the place of receipt evidenced in this FBL.
- -Goods- means any property including live animals as well as containers, pallets or similar articles of transport or packaging not supplied by the Freight Forwarder, irrespective of whether such property is to be or is carried on or under deck.

1. Applicability
Notwithstanding the heading -FIATA Multimodal Transport Bill of Lading (FBL)- these conditions shall also apply if only one mode of transport is used.
2. Issuance of this FBL
2.1. By issuance of this FBL the Freight Forwarder
a) undertakes to perform and/or in his own name to procure the performance of the entire transport, from the place at which the goods are taken in charge (place of receipt evidenced in this FBL) to the place of delivery designated in this FBL;
b) assumes liability as set out in these conditions.
2.2. Subject to the conditions of this FBL the Freight Forwarder shall be responsible for the acts and omissions of his servants or agents acting within the scope of their employment, or any other person of whose services he makes use for the performance of the contract evidenced by this FBL, as if such acts and omissions were his own.
3. Negotiability and title to the goods
3.1. This FBL is issued in a negotiable form unless it is marked -non negotiable-. It shall constitute title to the goods and the holder, by endorsement of this FBL, shall be entitled to receive or to transfer the goods herein mentioned.
3.2. The information in this FBL shall be prima facie evidence of the taking in charge by the Freight Forwarder of the goods as described by such information unless a contrary indication, such as -shipper's weight, load and count-, -shipper-packed container- or similar expressions, has been made in the printed text or superimposed on this FBL. However, proof to the contrary shall not be admissible when the FBL has been transferred to the consignee for valuable consideration who in good faith has relied and acted thereon.
4. Dangerous Goods and Indemnity
4.1. The Merchant shall comply with rules which are mandatory according to the national law or by reason of international Convention, relating to the carriage of goods of a dangerous nature, and shall in any case inform the Freight Forwarder in writing of the exact nature of the danger, before goods of a dangerous nature are taken in charge by the Freight Forwarder and indicate to him, if need be, the precautions to be taken.
4.2. If the Merchant fails to provide such information and the Freight Forwarder is unaware of the dangerous nature of the goods and the necessary precautions to be taken and if, at any time, they are deemed to be a hazard to life or property, they may at any place be unloaded, destroyed or rendered harmless, as circumstances may require, without compensation. The Merchant shall indemnify the Freight Forwarder against all loss, damage, liability, or expense arising out of their being taken in charge, or their carriage, or of any service incidental thereto.
The burden of proving that the Freight Forwarder knew the exact nature of the danger constituted by the carriage of the said goods shall rest on the Merchant.
4.3. If any goods shall become a danger to life or property, they may in like manner be unloaded or landed at any place or destroyed or rendered harmless. If such danger was not caused by the fault and neglect of the Freight Forwarder he shall have no liability and the Merchant shall indemnify him against all loss, damage, liability and expense arising therefrom.
5. Description of Goods and Merchant's Packing and Inspection
5.1. The Consignor shall be deemed to have guaranteed to the Freight Forwarder the accuracy, at the time the goods were taken in charge by the Freight Forwarder, of all particulars relating to the general nature of the goods, their marks, number, weight, volume and quantity and, if applicable, to the dangerous character of the goods, as furnished by him or on his behalf for insertion on the FBL.
The Consignor shall indemnify the Freight Forwarder against all loss, damage and expense resulting from any inaccuracy or inadequacy of such particulars.
The Consignor shall remain liable even if the FBL has been transferred by him.
The right of the Freight Forwarder to such an indemnity shall in no way limit his liability under this FBL to any person other than the Consignor.
5.2. The Freight Forwarder shall not be liable for any loss, damage or expense caused by defective or insufficient packing of goods or by inadequate loading or packing within containers or other transport units when such loading or packing has been performed by the Merchant or on his behalf by a person other than the Freight Forwarder, or by the defect or unsuitability of the containers or other transport units supplied by the Merchant, or if supplied by the Freight Forwarder if a defect or unsuitability of the container or other transport unit would have been apparent upon reasonable inspection by the Merchant. The Merchant shall indemnify the Freight Forwarder against all loss, damage, liability and expense so caused.
6. Freight Forwarder's Liability
6.1. The responsibility of the Freight Forwarder for the goods under these conditions covers the period from the time the Freight Forwarder has taken the goods in his charge to the time of their delivery.
6.2. The Freight Forwarder shall be liable for loss of or damage to the goods as well as for delay in delivery if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in Clause 2.1.a, unless the Freight Forwarder proves that no fault or neglect of his own, his servants or agents or any other person referred to in Clause 2.2. has caused or contributed to such loss, damage or delay. However, the Freight Forwarder shall only be liable for loss following from delay in delivery if the Consignor has made a declaration of interest in timely delivery which has been accepted by the Freight Forwarder and stated in this FBL.
6.3. Arrival times are not guaranteed by the Freight Forwarder. However, delay in delivery occurs when the goods have not been delivered within the [illegible]

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any place or destroyed or rendered harmless. If such danger was not caused by the fault and neglect of the Freight Forwarder he shall have no liability and the Merchant shall indemnify him against all [illegible], damage, liability and expense arising therefrom.

5. Description of Goods and Merchant's Packing and Inspection

5.1. The Consignor shall be deemed to have guaranteed to the Freight Forwarder the accuracy, at the time the goods were taken in charge by the Freight Forwarder, of all particulars relating to the general nature of the goods, their marks, number, weight, volume and quantity and, if applicable, to the dangerous character of the goods, as furnished by him or on his behalf for insertion on the FBL.
The Consignor shall indemnify the Freight Forwarder against all loss, damage and expense resulting from any inaccuracy or inadequacy of such particulars.
The Consignor shall remain liable even if the FBL has been transferred by him.
The right of the Freight Forwarder to such an indemnity shall in no way limit his liability under this FBL to any person other than the Consignor.

5.2. The Freight Forwarder shall not be liable for any loss, damage or expense caused by defective or insufficient packing of goods or by inadequate loading or packing within containers or other transport units when such loading or packing has been performed by the Merchant or on his behalf by a person other than the Freight Forwarder, or by the defect or unsuitability of the containers or other transport units supplied by the Merchant, or if supplied by the Freight Forwarder if a defect or unsuitability of the container or other transport unit would have been apparent upon reasonable inspection by the Merchant. The Merchant shall indemnify the Freight Forwarder against all loss, damage, liability and expense so caused.

6. Freight Forwarder's Liability

6.1. The responsibility of the Freight Forwarder for the goods under these conditions covers the period from the time the Freight Forwarder has taken the goods in his charge to the time of their delivery.

6.2. The Freight Forwarder shall be liable for loss of or damage to the goods as well as for delay in delivery if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in Clause 2.1.a, unless the Freight Forwarder proves that no fault or neglect of his own, his servants or agents or any other person referred to in Clause 2.2. has caused or contributed to such loss, damage or delay. However, the Freight Forwarder shall only be liable for loss following from delay in delivery if the Consignor has made a declaration of interest in timely delivery which has been accepted by the Freight Forwarder and stated in this FBL.

6.3. Arrival times are not guaranteed by the Freight Forwarder. However, delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon or, in the absence of such agreement, within the time which would be reasonable to require of a diligent Freight Forwarder, having regard to the circumstances of the case.

6.4. If the goods have not been delivered within ninety consecutive days following such date of delivery as determined in Clause 6.3., the claimant may, in the absence of evidence to the contrary, treat the goods as lost.

6.5. When the Freight Forwarder establishes that, in the circumstances of the case, the loss or damage could be attributed to one or more causes or events specified in a – e of the present clause, it shall be presumed that it was so caused, always provided, however, that the claimant shall be entitled to prove that the loss or damage was not, in fact, caused wholly or partly by one or more of such causes or events:

a) an act or omission of the Merchant, or person other than the Freight Forwarder acting on behalf of the Merchant or from whom the Freight Forwarder took the goods in charge;
b) insufficiency or defective condition of the packaging or marks and/or numbers;
c) handling, loading, stowage or unloading of the goods by the Merchant or any person acting on behalf of the Merchant;
d) inherent vice of the goods;
e) strike, lockout, stoppage or restraint of labour.

6.6. Defences for carriage by sea or inland waterways
Notwithstanding Clauses 6.2., 6.3. and 6.4. the Freight Forwarder shall not be liable for loss, damage or delay in delivery with respect to goods carried by sea or inland waterways when such loss, damage or delay during such carriage has been caused by:

a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship,
b) fire, unless caused by the actual fault or privity of the carrier, however, always provided that whenever loss or damage has resulted from unseaworthiness of the ship, the Freight Forwarder can prove that due diligence has been exercised to make the ship seaworthy at the commencement of the voyage.

7. Paramount Clauses

7.1. These conditions shall only take effect to the extent that they are not contrary to the mandatory provisions of International Conventions or national law applicable to the contract evidenced by this FBL.

7.2. The Hague Rules contained in the International Convention for the unification of certain rules relating to Bills of Lading, dated Brussels 25th August 1924, or in those countries where there are already in force the Hague-Visby Rules contained in the Protocol of Brussels, dated 23rd February 1968, as enacted in the country of Shipment, shall apply to all carriage of goods by sea and also to the carriage of goods by inland waterways, and such provisions shall apply to all goods whether carried on deck or under deck.

7.3. The Carriage of Goods by Sea Act of the United States of America (COGSA) shall apply to the carriage of goods by sea, whether on deck or under deck, if compulsorily applicable to this FBL or would be applicable but for the goods being carried on deck in accordance with a statement on this FBL.

8 Limitation of Freight Forwarder's Liability

8 Assessment of compensation for loss of or damage to the goods shall be made by reference to the value of such goods at the place and time they are delivered to the consignee or at the place and time when, in accordance with this FBL, they should have been so delivered.

8.2. The value of the goods shall be determined according to the current commodity exchange price or, if there is no such price, according to the current market price or, if there are no such prices, by reference to the normal value of goods of the same name and quality.

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12. Delivery

12.1. Goods shall be deemed to be delivered
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12.2. The Freight Forwarder shall also be enti
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12.3. If at any time the carriage under this FBL
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13. Freight and Charges

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13.6. Despite the acceptance by the Freight F
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14. Lien
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15. General Average
The Merchant shall indemnify the Freigh
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16. Notice

16.1. Unless notice of loss of or damage to
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8.3. Subject to the provisions o... clauses 8.4. to 8.9. inclusive, the Freight Forwarder shall in no event be or become liable for any loss of or damage to the goods in an amount exceeding the equivalent of 666.67 SDR per package or unit or 2 SDR per kilogramme of gross weight of the goods lost or damaged, whichever is the higher, unless the nature and value of the goods shall have been declared by the Consignor and accepted by the Freight Forwarder before the goods have been taken in his charge, or the ad valorem freight rate paid, and such value is stated in the FBL by him, then such declared value shall be the limit.

8.4. Where a container, pallet or similar article of transport is loaded with more than one package or unit, the packages or other shipping units enumerated in the FBL as packed in such article of transport are deemed packages or shipping units. Except as aforesaid, such article of transport shall be considered the package or unit.

8.5. Notwithstanding the above mentioned provisions, if the multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the Freight Forwarder shall be limited to an amount not exceeding 8.33 SDR per kilogramme of gross weight of the goods lost or damaged.

8.6. a) When the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law would have provided another limit of liability if a separate contract of carriage had been made for that particular stage of transport, then the limit of the Freight Forwarder's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law.

b) Unless the nature and value of the goods shall have been declared by the Merchant and inserted in this FBL, and the ad valorem freight rate paid, the liability of the Freight Forwarder under COGSA, where applicable, shall not exceed US$ 500 per package or, in the case of goods not shipped in packages, per customary freight unit.

8.7. If the Freight Forwarder is liable in respect of loss following from delay in delivery, or consequential loss or damage other than loss of or damage to the goods, the liability of the Freight Forwarder shall be limited to an amount not exceeding the equivalent of twice the freight under the multimodal contract for the multimodal transport under this FBL.

8.8. The aggregate liability of Freight Forwarder shall not exceed the limits of liability for total loss of the goods.

8.9. The Freight Forwarder is not entitled to the benefit of the limitation of liability if it is proved that the loss, damage or delay in delivery resulted from a personal act or omission of the Freight Forwarder done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

9. **Applicability to Actions in Tort**
These conditions apply to all claims against the Freight Forwarder relating to the performance of the contract evidenced by this FBL, whether the claim be founded in contract or in tort.

10. **Liability of Servants and other Persons**

10.1. These conditions apply whenever claims relating to the performance of the contract evidenced by this FBL are made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract, whether such claims are founded in contract or in tort, and the aggregate liability of the Freight Forwarder and of such servants, agents or other persons shall not exceed the limits in clause 8.

10.2. In entering into this contract as evidenced by this FBL, the Freight Forwarder, to the extent of these provisions, does not only act on his own behalf, but also as agent or trustee for such persons, and such persons shall to this extent be or be deemed to be parties to this contract.

10.3. However, if it is proved that the loss of or such loss or damage to the goods resulted from a personal act or omission of such a person referred to in Clause 10.1., done with intent to cause damage, or recklessly and with knowledge that damage would probably result, such person shall not be entitled to benefit of limitation of liability provided for in Clause 8.

10.4. The aggregate of the amounts recoverable from the Freight Forwarder and the persons referred to in Clauses 2.2. and 10.1. shall not exceed the limits provided for in these conditions.

11. **Method and Route of Transportation**
Without notice to the Merchant, the Freight Forwarder has the liberty to carry the goods on or under deck and to choose or substitute the means, route and procedure to be followed in the handling, stowage, storage and transportation of the goods.

12. **Delivery**

12.1. Goods shall be deemed to be delivered when they have been handed over or placed at the disposal of the Consignee or his agent in accordance with this FBL, or when the goods have been handed over to any authority or other party to whom, pursuant to the law or regulation applicable at the place of delivery, the goods must be handed over, or such other place at which the Freight Forwarder is entitled to call upon the Merchant to take delivery.

12.2. The Freight Forwarder shall also be entitled to store the goods at the sole risk of the Merchant, and the Freight Forwarder's liability shall cease, and the cost of such storage shall be paid, upon demand, by the Merchant to the Freight Forwarder.

12.3. If at any time the carriage unter this FBL is or is likely to be affected by any hindrance or risk of any kind (including the condition of the goods) not arising from any fault or neglect of the Freight Forwarder or a person referred to in Clause 2.2. and which cannot be avoided by the exercise of reasonable endeavours the Freight Forwarder may:

abandon the carriage of the goods under this FBL and, where reasonably possible, place the goods or any part of them at the Merchant's disposal at any place which the Freight Forwarder may deem safe and convenient, whereupon delivery shall be deemed to have been made, and the responsibility of the Freight Forwarder in respect of such goods shall cease.

In any event, the Freight Forwarder shall be entitled to full freight under this FBL and the Merchant shall pay any additional costs resulting from the above mentioned circumstances.

13. **Freight and Charges**

13.1. Freight shall be paid in cash, without any reduction or deferment on account of any claim, counterclaim or set-off, whether prepaid or payable at destination.
Freight shall be considered as earned by the Freight Forwarder at the moment when the goods have been taken in his charge, and not to be returned in any event.

13.2. Freight and all other amounts mentioned in this FBL are to be paid in the currency named in this FBL or, at the Freight Forwarder's option, in the currency of the country of dispatch or destination at the highest rate of exchange for bankers sight bills current for prepaid freight on the day of dispatch and for freight payable at destination on the day when the Merchant is notified on arrival of the goods there or on the date of withdrawal of the delivery order, whichever rate is the higher, or at the option of the Freight Forwarder on the date of this FBL.

13.3. All dues, taxes and charges or other expenses in connection with the [illegible]

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12. Delivery

12.1. Goods shall be deemed to be delivered when they have been handed over or placed at the disposal of the Consignee or his agent in accordance with this FBL, or when the goods have been handed over to any authority or other party to whom, pursuant to the law or regulation applicable at the place of delivery, the goods must be handed over, or such other place at which the Freight Forwarder is entitled to call upon the Merchant to take delivery.

12.2. The Freight Forwarder shall also be entitled to store the goods at the sole risk of the Merchant, and the Freight Forwarder's liability shall cease, and the cost of such storage shall be paid, upon demand, by the Merchant to the Freight Forwarder.

12.3. If at any time the carriage under this FBL is or is likely to be affected by any hindrance or risk of any kind (including the condition of the goods) not arising from any fault or neglect of the Freight Forwarder or a person referred to in Clause 2.2. and which cannot be avoided by the exercise of reasonable endeavours the Freight Forwarder may:

abandon the carriage of the goods under this FBL and, where reasonably possible, place the goods or any part of them at the Merchant's disposal at any place which the Freight Forwarder may deem safe and convenient, whereupon delivery shall be deemed to have been made, and the responsibility of the Freight Forwarder in respect of such goods shall cease.

In any event, the Freight Forwarder shall be entitled to full freight under this FBL and the Merchant shall pay any additional costs resulting from the above mentioned circumstances.

13. Freight and Charges

13.1. Freight shall be paid in cash, without any reduction or deferment on account of any claim, counterclaim or set-off, whether prepaid or payable at destination.
Freight shall be considered as earned by the Freight Forwarder at the moment when the goods have been taken in his charge, and not to be returned in any event.

13.2. Freight and all other amounts mentioned in this FBL are to be paid in the currency named in this FBL or, at the Freight Forwarder's option, in the currency of the country of dispatch or destination at the highest rate of exchange for bankers sight bills current for prepaid freight on the day of dispatch and for freight payable at destination on the day when the Merchant is notified on arrival of the goods there or on the date of withdrawal of the delivery order, whichever rate is the higher, or at the option of the Freight Forwarder on the date of this FBL.

13.3. All dues, taxes and charges or other expenses in connection with the goods shall be paid by the Merchant.
Where equipment is supplied by the Freight Forwarder, the Merchant shall pay all demurrage and charges which are not due to a fault or neglect of the Freight Forwarder.

13.4. The Merchant shall reimburse the Freight Forwarder in proportion to the amount of freight for any costs for deviation or delay or any other increase of costs of whatever nature caused by war, warlike operations, epidemics, strikes, government directions or force majeure.

13.5. The Merchant warrants the correctness of the declaration of contents, insurance, weight, measurements or value of the goods but the Freight Forwarder has the liberty to have the contents inspected and the weight, measurements or value verified. If on such inspection it is found that the declaration is not correct it is agreed that a sum equal either to five times the difference between the correct figure and the freight charged, or to double the correct freight less the freight charged, whichever sum is the smaller, shall be payable as liquidated damages to the Freight Forwarder for his inspection costs and losses of freight on other goods notwithstanding any other sum having been stated on this FBL as freight payable.

13.6. Despite the acceptance by the Freight Forwarder of instructions to collect freight, charges or other expenses from any other person in respect of the transport under this FBL, the Merchant shall remain responsible for such monies on receipt of evidence of demand and the absence of payment for whatever reason.

14. Lien
The Freight Forwarder shall have a lien on the goods and any documents relating thereto for any amount due at any time to the Freight Forwarder from the Merchant including storage fees and the cost of recovering same, and may enforce such lien in any reasonable manner which he may think fit.

15. General Average
The Merchant shall indemnify the Freight Forwarder in respect of any claims of a General Average nature which may be made on him and shall provide such security as may be required by the Freight Forwarder in this connection.

16. Notice

16.1. Unless notice of loss of or damage to the goods, specifying the general nature of such loss or damage, is given in writing by the consignee to the Freight Forwarder when the goods are delivered to the consignee in accordance with clause 12, such handing over is prima facie evidence of the delivery by the Freight Forwarder of the goods as described in this FBL.

16.2. Where the loss or damage is not apparent, the same prima facie effect shall apply if notice in writing is not given within 6 consecutive days after the day when the goods were delivered to the consignee in accordance with clause 12.

17. Time bar
The Freight Forwarder shall, unless otherwise expressly agreed, be discharged of all liability under these conditions unless suit is brought within 9 months after the delivery of the goods, or the date when the goods should have been delivered, or the date when in accordance with clause 6.4. failure to deliver the goods would give the consignee the right to treat the goods as lost.

18. Partial invalidity
If any clause or a part thereof is held to be invalid, the validity of this FBL and the remaining clauses or a part thereof shall not be affected.

19. Jurisdiction and applicable law
Actions against the Freight Forwarder may be instituted only in the place where the Freight Forwarder has his place of business as stated on the reverse of this FBL and shall be decided according to the law of the country in which that place of business is situated.

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INTERNATIONAL CARGO CONTROL BILL OF LADING

Standard Conditions (1992) governing the FIATA MULTIMODAL TRANSPORT BILL OF LADING

Definitions

- "Freight Forwarder" means the Multimodal Transport Operator who issues this FBL and is named on the face of it and assumes liability for the performance of the multimodal transport contract as a carrier.
- "Merchant" means and includes the Shipper, the Consignor, the Consignee, the Holder of this FBL, the Receiver and the Owner of the Goods.
- "Consignor" means the person who concludes the multimodal transport contract with the Freight Forwarder.
- "Consignee" means the person entitled to receive the goods from the Freight Forwarder.
- "Taken in charge" means that the goods have been handed over to and accepted for carriage by the Freight Forwarder at the place of receipt evidenced in this FBL.
- "Goods" means any property including live animals as well as containers, pallets or similar articles of transport or packaging not supplied by the Freight Forwarder, irrespective of whether such property is to be or is carried on or under deck.

1 Applicability

Notwithstanding the heading "FIATA Multimodal Transport Bill of Lading (FBL)" these conditions shall also apply if only one mode of transport is used.

2. Issuance of this FBL

2.1 By issuance of this FBL the Freight Forwarder:

a) undertakes to perform and/or in his own name to procure the performance of the entire transport, from the place at which the goods are taken in charge (place of receipt evidenced in this FBL) to the place of delivery designated in this FBL;

b) assumes liability as set out in these conditions.

2.2 Subject to the conditions of this FBL the Freight Forwarder shall be responsible for the, acts and omissions of his servants or agents acting within the scope of their employment, or any other person of whose services he makes use for the performance of the contract evidenced by this FBL, as if such acts and omissions were his own.

3. Negotiability and title to the goods

3.1 This FBL is issued in a negotiable form unless it is marked "non-negotiable". It shall constitute title to the goods and the holder, by endorsement of this FBL, shall be entitled to receive or to transfer the goods herein mentioned.

3.2 The information in this FBL shall be prima facie evidence of the taking in charge by the Freight Forwarder of the goods as described by such information unless a contrary indication, such as "shipper's weight, load and count", "shipper-packed container" or similar expressions, has been made in the printed text or superimposed on this FBL. However, proof to the contrary shall not be admissible when the FBL has been transferred to the consignee for valuable consideration who in good faith has relied and acted thereon.

4. Dangerous Goods and Indemnity

4.1 The Merchant shall comply with rules which are mandatory according to the national law or by reason of International Convention, relating to the carriage of goods of a dangerous nature, and shall in any case inform the Freight Forwarder in writing of the exact nature of the danger, before goods of a dangerous nature are taken in charge by the Freight Forwarder and indicate to him, if need be, the precautions to be taken.

4.2 If the Merchant fails to provide such information and the Freight Forwarder is unaware of the dangerous nature of the goods and the necessary precautions to be taken and if, at any time, they are deemed to be a hazard to life or property, they may at any place be unloaded, destroyed or rendered harmless, as circumstances may require, without compensation. The Merchant shall indemnify the Freight Forwarder against all loss, damage, liability, or expense arising out of their being taken in charge, or their carriage, or of any service incidental thereto.

The burden of proving that the Freight Forwarder knew the exact nature of the danger constituted by the carriage of the said goods shall rest on the Merchant.

4.3 If any goods shall become a danger to life or property, they may in like manner be unloaded or landed at any place or destroyed or rendered harmless. If such danger was not caused by the fault and neglect of the Freight Forwarder he shall have no liability and the Merchant shall indemnify him against all loss, damage, liability and expense arising therefrom.

5 Description of Goods and Merchant's Packing and Inspection

5.1 The Consignor shall be deemed to have guaranteed to the Freight Forwarder the accuracy, at the time the goods were taken in charge by the Freight Forwarder, of all particulars relating to the general nature of the goods, their marks, number, weight, volume and quantity and, if applicable, to the dangerous character of the goods, as furnished by him or on his behalf for insertion on the FBL.

The Consignor shall indemnify the Freight Forwarder against all loss, damage and expense resulting from any inaccuracy or inadequacy of such particulars.

The Consignor shall remain liable even if the FBL has been transferred by him.

The right of the Freight Forwarder to such an indemnity shall in no way limit his liability under this FBL to any person other than the Consignor.

5.2 The Freight Forwarder shall not be liable for any loss, damage or expense caused by defective or insufficient packing of goods or by inadequate loading or packing within containers or other transport units when such loading or packing has been performed by the Merchant or on his behalf by a person other than the Freight Forwarder, or by the defect or unsuitability of the containers or other transport units supplied by the Merchant, or if supplied by Freight Forwarder if a defect or unsuitability of the container or other transport unit would have been apparent upon reasonable inspection by the Merchant. The Merchant shall indemnify the Freight Forwarder against all loss, damage, liability and expense so caused.

6 Freight Forwarder's Liability

6.1 The responsibility of the Freight Forwarder for the goods under these conditions covers the period from the time the Freight Forwarder has taken the goods in his charge to the time of their delivery.

6.2 The Freight Forwarder shall be liable for loss of or damage to the goods as well as for delay in delivery if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in Clause 2.1 a, unless the Freight Forwarder proves that no fault or neglect of his own, his servants or agents or any other person referred to in Clause 2.2 has caused or contributed to such loss, damage or delay. However, the Freight Forwarder shall only be liable for loss following from delay in delivery if the Consignor has made a declaration of interest in timely delivery which has been accepted by the Freight Forwarder and stated in this FBL.

6.3 Arrival times are not guaranteed by the Freight Forwarder. However, delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon or, in the absence of such agreement, within the time which would be reasonable to require of a diligent Freight Forwarder, having regard to the circumstances of the case.

6.4 If the goods have not been delivered within ninety consecutive days following such date of delivery as determined in Clause 6.3, the claimant may, in the absence of evidence to the contrary, treat the goods as lost.

6.5 When the Freight Forwarder establishes that, in the circumstances of the case, the loss or damage could be attributed to one or more causes or events, specified in a-e of the present clause, it shall be presumed that it was so caused, always provided, however, that the

claimant shall be entitled to prove that the loss or damage was not, in fact, caused wholly or partly by one or more of such causes or events:

a) an act or omission of the Merchant, or person other than the Freight Forwarder acting on behalf of the Merchant or from whom the Freight Forwarder took the goods in charge;

b) insufficiency or defective condition of the packaging or marks and/or numbers;

c) handling, loading, stowage or unloading of the goods by the Merchant or any person acting on behalf of the Merchant;

d) inherent vice of the goods;

e) strike, lockout, stoppage or restraint of labour.

6.6. Defences for carriage by sea or inland waterways

Notwithstanding Clauses 6.2., 6.3. and 6.4. the Freight Forwarder shall not be liable for loss, damage or delay in delivery with respect to goods carried by sea or inland waterways when such loss, damage or delay during such carriage has been caused by:

a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship.

b) fire, unless caused by the actual fault or privity of the carrier, however, always provided that whenever loss or damage has resulted from unseaworthiness of the ship, the Freight Forwarder can prove that due diligence has been exercised to make the ship seaworthy at the commencement of the voyage.

7. Paramount Clauses

7.1. These conditions shall only take effect to the extent that they are not contrary to the mandatory provisions of International Conventions or national law applicable to the contract evidenced by this FBL.

7.2. The Hague Rules contained in the International Convention for the unification of certain rules relating to Bills of Lading, dated Brussels 25th August 1924, or in those countries where there are already in force the Hague-Visby Rules contained in the Protocol of Brussels, dated 23rd February 1968, as enacted in the Country of Shipment, shall apply to all carriage of goods by sea and also to the carriage of goods by inland waterways, and such provisions shall apply to all goods whether carried on deck or under deck.

7.3. The Carriage of Goods by Sea Act of the United States of America (COGSA) shall apply to the carriage of goods by sea, whether on deck or under deck, if compulsorily applicable to this FBL or would be applicable but for the goods being carried on deck in accordance with a statement on this FBL.

8. Limitation of Freight Forwarder's Liability

8.1. Assessment of compensation for loss of or damage to the goods shall be made by reference to the value of such goods at the place and time they are delivered to the consignee or at the place and time when, in accordance with this FBL, they should have been so delivered.

8.2. The value of the goods shall be determined according to the current commodity exchange price or, if there is no such price, according to the current market price or, if there are no such prices, by reference to the normal value of goods of the same name and quality.

8.3 Subject to the provisions of subclauses 8.4 to 8.9 inclusive, the Freight Forwarder shall in no event be or become liable for any loss of or damage to the goods in an amount exceeding the equivalent of 666.67 SDR per package or unit or 2 SDR per kilogramme of gross weight of the goods lost or damaged, whichever is the higher, unless the nature and value of the goods shall have been declared by the Consignor and accepted by the Freight Forwarder before the goods have been taken in his charge, or the ad valorem freight rate paid, and such value is stated in the FBL by him, then such declared value shall be the limit.

8.4 Where a container, pallet or similar article of transport is loaded with more than one package or unit, the packages or other shipping units enumerated in the FBL as packed in such article of transport are deemed packages or shipping units. Except as aforesaid, such article of transport shall be considered the package or unit.

8.5 Notwithstanding the above mentioned provisions, if the multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the Freight Forwarder shall be limited to an amount not exceeding 8.33 SDR per kilogramme of gross weight of the goods lost or damaged.

8.6 a) When the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law would have provided another limit of liability if a separate contract of carriage had been made for that particular stage of transport, then the limit of the Freight Forwarder's liability for such loss or damage shall be determined by reference to the

provisions of such convention or mandatory national law.

b) Unless the nature and value of the goods shall have been declared by the Merchant and inserted in this FBL, and the ad valorem freight rate paid, the liability of the Freight Forwarder under COGSA, where applicable, shall not exceed US$ 500 per package or, in the case of goods not shipped in packages, per customary freight unit.

8.7 If the Freight Forwarder is liable in respect of loss following from delay in delivery, or consequential loss or damage other than loss of or damage to the goods, the liability of the Freight Forwarder shall be limited to an amount not exceeding the equivalent of twice the freight under the multimodal contract for the multimodal transport under this FBL.

8.8 The aggregate liability of Freight Forwarder shall not exceed the limits of liability for total loss of the goods.

8.9 The Freight Forwarder is not entitled to the benefit of the limitation of liability if it is proved that the loss, damage or delay in delivery resulted from a personal act or omission of the Freight Forwarder done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

9. Applicability to Actions in Tort

These conditions apply to all claims against the Freight Forwarder relating to the performance of the contract evidenced by this FBL, whether the claim be founded in contract or in tort.

10. Liability of Servants and other Persons

10.1 These conditions apply whenever claims relating to the performance of the contract evidenced by this FBL

are made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract, whether such claims are founded in contract or in tort, and the aggregate liability of the Freight Forwarder and of such servants, agents or other persons shall not exceed the limits in clause 8.

10.2. In entering into this contract as evidenced by this FBL, the Freight Forwarder, to the extent of these provisions, does not only act on his own behalf, but also as agent or trustee for such persons, and such persons shall to this extent be or be deemed to be parties to this contract.

10.3. However, if it is proved that the loss of or such loss or damage to the goods resulted from a personal act or omission of such a person referred to in Clause 10.1., done with intent to cause damage, or recklessly and with knowledge that damage would probably result, such person shall not be entitled to benefit of limitation of liability provided for in Clause 8.

10.4. The aggregate of the amounts recoverable from the Freight Forwarder and the persons referred to in Clauses 2.2. and 10.1. shall not exceed the limits provided for in these conditions.

11. Method and Route of Transportation

Without notice to the Merchant, the Freight Forwarder has the liberty to carry the goods on or under deck and to choose or substitute the means, route and procedure to be followed in the handling, stowage, storage and transportation of the goods.

12. Delivery

12.1. Goods shall be deemed to be delivered when they have been handed over or placed at the disposal of the Consignee or his agent in accordance with this FBL,

or when the goods have been handed over to any authority or other party to whom, pursuant to the law or regulation applicable at the place of delivery, the goods must be handed over, or such other place at which the Freight Forwarder is entitled to call upon the Merchant to take delivery.

12.2. The Freight Forwarder shall also be entitled to store the goods at the sole risk of the Merchant, and the Freight Forwarder's liability shall cease, and the cost of such storage shall be paid, upon demand, by the Merchant to the Freight Forwarder.

12.3. If at any time the carriage under this FBL is or is likely to be affected by any hindrance or risk of any kind (including the condition of the goods) not arising from any fault or neglect of the Freight Forwarder or a person referred to in Clause 2.2. and which cannot be avoided by the exercise of reasonable endeavours the Freight Forwarder may:

abandon the carriage of the goods under this FBL and, where reasonably possible, place the goods or any part of them at the Merchant's disposal at any place which the Freight Forwarder may deem safe and convenient, whereupon delivery shall be deemed to have been made, and the responsibility of the Freight Forwarder in respect of such goods shall cease.

In any event, the Freight Forwarder shall be entitled to full freight under this FBL and the Merchant shall pay any additional costs resulting from the above mentioned circumstances.

13. Freight and Charges

13.1. Freight shall be paid in cash, without any reduction or deferment on account of any claim, counterclaim or set-off, whether prepaid or payable at destination.

Freight shall be considered as earned by the Freight Forwarder at the moment when the goods have been taken in his charge, and not to be returned in any event.

13.2. Freight and all other amounts mentioned in this FBL are to be paid in the currency named in this FBL or, at the Freight Forwarder's option, in the currency of the country of dispatch or destination at the highest rate of exchange for bankers sight bills current for prepaid freight on the day of dispatch and for freight payable at destination on the day when the Merchant is notified on arrival of the goods there or on the date of withdrawal of the delivery order, whichever rate is the higher, or at the option of the Freight Forwarder on the date of this FBL.

13.3. All dues, taxes and charges or other expenses in connection with the goods shall be paid by the Merchant.

Where equipment is supplied by the Freight Forwarder, the Merchant shall pay all demurrage and charges which are not due to a fault or neglect of the Freight Forwarder.

13.4. The Merchant shall reimburse the Freight Forwarder in proportion to the amount of freight for any costs for deviation or delay or any other increase of costs of whatever nature caused by war, warlike operations, epidemics, strikes, government directions or force majeure.

13.5. The Merchant warrants the correctness of the declaration of contents, insurance, weight, measurements or value of the goods but the Freight Forwarder has the liberty to have the contents inspected and the weight, measurements or value verified. If on such inspection it is found that the declaration is not correct it is agreed that a sum equal

either to five times the difference between the correct figure and the freight charged, or to double the correct freight less the freight charged, whichever sum is the smaller, shall be payable as liquidated damages to the Freight Forwarder for his inspection costs and losses of freight on other goods notwithstanding any other sum having been stated on this FBL as freight payable.

13.6. Despite the acceptance by the Freight Forwarder of instructions to collect freight, charges or other expenses from any other person in respect of the transport under this FBL, the Merchant shall remain responsible for such monies on receipt of evidence of demand and the absence of payment for whatever reason.

14. Lien

The Freight Forwarder shall have a lien on the goods and any documents relating thereto for any amount due at any time to the Freight Forwarder from the Merchant including storage fees and the cost of recovering same, and may enforce such lien in any reasonable manner which he may think fit.

15. General Average

The Merchant shall indemnify the Freight Forwarder in respect of any claims of a General Average nature which may be made on him and shall provide such security as may be required by the Freight Forwarder in this connection.

16. Notice

16.1. Unless notice of loss or damage to the goods, specifying the general nature of such loss or damage, is given in writing by the consignee to the Freight Forwarder when the goods are delivered to the consignee in accordance with clause 12, such handing

over is prima facie evidence of the delivery by the Freight Forwarder of the goods as described in this FBL.

16.2 Where the loss or damage is not apparent, the same prima facie effect shall apply if notice in writing is not given within 6 consecutive days after the day when the goods were delivered to the consignee in accordance with clause 12.

17. Time bar

The Freight Forwarder shall, unless otherwise expressly agreed, be discharged of all liability under these conditions unless suit is brought within 9 months after the delivery of the goods, or the date when the goods should have been delivered, or the date when in accordance with clause 6.4. failure to deliver the goods would give the consignee the right to treat the goods as lost.

18. Partial Invalidity

If any clause or a part thereof is held to be invalid, the validity of this FBL and the remaining clauses or a part thereof shall not be affected.

19. Jurisdiction and applicable law

Actions against the Freight Forwarder may be instituted only in the place where the Freight Forwarder has his place of business as stated on the reverse of this FBL and shall be decided according to the law of the country in which that place of business is situated.

The ICC logo denotes that this document has been deemed by the ICC to be in conformity with the UNCTAD/ICC Rules for Multimodal Transport Documents. The ICC logo does not imply ICC endorsement of the document nor does it in any

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NS NORFOLK SOUTHERN

Norfolk Southern Corporation
National Customer Service Center
185 Spring Street, S.W. • Box 153
Atlanta, Georgia 30303

Randy L. Brink
Claim Settlement
Phone 404-658-2031
Fax 404-658-2038

May 20, 1998

Mr. Alan Powell
Customs & Shipping Manager
Kirby Engineering
286 Horsley Road
Milperra NSW 2214
AUSTRALIA

Dear Mr. Powell:

Please refer to your claim dated May 1, 1998, received in our office May 18, 1998, in amount of AUD2,065,183.00, covering damage to shipments of machinery parts that moved in various 20-foot ocean containers.

Under Norfolk Southern's Circular No. 1-A, which governed this shipment, Rule 16, Article B, Paragraph 4, Subparagraph (h) states that Norfolk Southern shall not be liable for loss damage or delay to lading to any party other than the Rail Services Buyer. NS will not be under any obligation to process any claim by any person other than the Rail Services Buyer.

In this case, the rail service buyer is Columbus Line USA, Inc. You should look to Columbus Line for recovery. Any claims to Norfolk Southern must be likewise filed by Columbus Line. In light of the this, your claim as submitted is respectfully declined. We will hold your claim documents pending formal claim from Columbus Line.

Please call if you have any questions making reference to our claim file 756827-I.

Very truly yours,

/s/ Randy L. Brink
RANDY L. BRINK
Customer Service Representative

NS NORFOLK SOUTHERN

Norfolk Southern Corporation
National Customer Service Center
185 Spring Street, S.W. • Box 153
Atlanta, Georgia 30303

Randy L. Brink
Claim Settlement
Phone 404-658-2031
Fax 404-658-2038

June 9, 1998

Mr. Alan Powell
Customs & Shipping Manager
Kirby Engineering
286 Horsley Road
Milperra NSW 2214
AUSTRALA

Dear Mr. Powell:

We received on June 8, 1998, your claim number 15209, in amount of AUD2,0656,183.00, covering damage to shipments of machinery parts that moved in various 20-foot ocean containers. As you state in your cover letter, this claim replaces your previous claim covering these same shipments.

Under Norfolk Southern's Circular No. 1-A, which governed this shipment, Rule 16, Article B, Paragraph 4, Subparagraph (h) states that Norfolk Southern shall not be liable for loss damage or delay to lading to any party other than the Rail Services Buyer. NS will not be under any obligation to process any claim by any person other than the Rail Services Buyer.

In this case, the rail services buyer is Columbus Line USA Inc. You should look to Columbus Line for recovery. Any claims to Norfolk Southern must be likewise filed by Columbus Line. In light of the this, your claim as submitted is respectfully declined. We will hold your claim documents pending our receipt of formal claim from Columbus Line.

Please call if you have any questions making reference to our claim file 756827-I.

Very truly yours,

/s/ Randy L. Brink
RANDY L. BRINK
Customer Service Representative

HAMBURG SUD
The Shipping Group

COLUMBUS LINE AUSTRALIA PTY. LTD.
A.C.N. 000 807 858

FACSIMILE MESSAGE HEADER

TO: AIR-SEA TANSPORT
ATTENTION: KEN ANDERSEN

FROM: R.W. GRIMSHAW

DATE: 13 March, 1998

NO. OF PAGES 2 (Including this header)

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE TELEPHONE IMMEDIATELY

RE. "QUEENSLAND STAR" VOYAGE 030NB
SYDNEY/SAVANNAH/HUNTSVILLE B/L 273
DE-RAILMENT NEAR HUNTSVILLE - 9/10/97

We refer to previous correspondence, relative to the subject matter and now enclose, for your reference, a copy of the Rail Car Order/Billing document in respect of the above consignment.

We trust that this document is of assistance.

Regards,

/s/ R. W. Grimshaw
R. W. GRIMSHAW
National Claims Manager

Encl.

CLM.054

Columbus Line USA, Inc.
Independence Square West
Curtis Center - Suite L30
Philadelphia, PA 19106
(PH) (800) 901-7447
(FAX) (215) 829-9507
Tom Walker - Equipment Control/Intermodal Coordinator

RAIL CAR ORDER/BILLING

To: Norfolk Southern Savannah - Rail Billing
To: GPA - Leo Dixon
To: SIT - Tina
cc: COLSAV - Tina

Please load the following containers (COFC) 10-06-97:

Container #:

BHCU 2226201 - 35,405# -28" O.H.
ICSU 4635342 - 27,557# - 22" O.H.
TOLU 4531516 - 31,084# - 28" O.H.
TOLU 4656568 - 26,521# - 22" O.H.
TOLU 4685050 - 32,054 - 22" O.H.
TOLU 4692233 - 26,521# - 23" O.H.
TOLU 4694977 - 36,662# - 28" O.H.
TRLU 9028644 - 37,852# - 25" O.H.

IT#	V5000073092	Commodity:	Machinery
Vessel:	Queensland Star v. 30n		
Weight:	see above		
Size/type:	20 open tops	Service:	Ramp to Ramp
Origin Ramp:	Savannah, GA	Destination Ramp:	Huntsville, AL

Shipper/Bill to party:

Columbus Line USA, Inc.
Independence Square West
Curtis Center - Suite L 30
Philadelphia, PA 19106

Notify Party:

Air and Sea International
Attn: Allan
(908) 687-6525 (P)
(908) 687-0244 (F)

BEST AVAILABLE COPY

NORFOLK SOUTHERN

P.O. BOX 79422
CHARLOTTE, NC 28275
11-07-97
$268.00

FREIGHT BILL NO.
2294022832
FREIGHT BILL DATE
10-23-97
Destination Agent No.

CUSTOMER NO.
00129300B9
SUBSIDIARY

COLUMBUS LINE INC
HARBORSIDE FINANCIAL CENTER
PLAZA 3
JERSEY CITY NJ 07302

ORIGINAL FREIGHT BILL

FREIGHT BILL

LENGTH OF CAR
10-06-97
VERSION 04

37152 HUNTSVILLE AL
ATLANTA ATL GA

36BDEN CITY
ATLANTA ADC

COLUMBUS LINE INC
HARBORSIDE FINANCIAL CENTER
PLAZA 3

COLUMBUS LINE INC
HARBORSIDE FINANCIAL CENTER
PLAZA 3

20' OPEN TOPS
INBOND IT#: V50000*3082
NOTIFY ALLEN
908 687-6525 FAX
MIXED SHIPMENT

STACK TRAIN

SHIPPER'S CERTIFIED WEIGHT

ALLOWANCE

SVS
NON

SHIPPER LOAD AND COUNT NO.

36662 285.0000 160.00 241 30

3611-030N

2294022832 10-23-97 00129300B9 $268.00

NORFOLK SOUTHERN

00048

3286 03287 N 3089008

BRIAN AYERS 11-07-97 P.O. BOX 79823 CHARLOTTE, NC, 28275 $268.00

COLUMBUS LINE INC
HARBORSIDE FINANCIAL CENTER
PLAZA 2
JERSEY CITY NJ 07302

FREIGHT BILL NO. 3286022872
FREIGHT BILL DATE 10-22-97
Destination Agents No.
CUSTOMER NO. 0012830089
SUBSIDIARY
Misc. Prc No.

FREIGHT BILL

STCC THIS CAR AT

LENGTH OF CAR
CAPACITY OF CAR
10-08-97
VERSION 04

D/S 97193 HUNTSVILLE AL
3300 GARDEN CITY GA

COLUMBUS LINE INC
HARBORSIDE FINANCIAL CENTER
PLAZA 2

COLUMBUS LINE INC
HARBORSIDE FINANCIAL CENTER
PLAZA 2

20' OPEN TOPS
INBOND IT#: V58000730B1
NOTIFY ALLEN
NOTIFY 800 687-8825 EXT
EMPTY EQUIPMENT

STACK TRAIN

SHIPPER LOAD
AAR COUNT NO

SHIPPER'S CERTIFIED WEIGHT
ALLOWANCE

3000 CONTAINER 5CV 37882 288.0000 268.00 268.00

361-030N

3286022872 10-22-97 0012830089 $268.00

NORFOLK SOUTHERN

00048

3286 03282 N 3089008

BRIAN AYERS 11-07-97 P.O. BOX 79823 CHARLOTTE, NC, 28275 $268.00

COLUMBUS LINE INC
HARBORSIDE FINANCIAL CENTER
PLAZA 2
JERSEY CITY NJ 07302

FREIGHT BILL NO. 3286022832
FREIGHT BILL DATE 10-23-97
Destination Agents No.
CUSTOMER NO. 0012830089
SUBSIDIARY
Misc. Prc No.

ORIGINAL FREIGHT BILL

FREIGHT BILL

STCC THIS CAR AT

LENGTH OF CAR
CAPACITY OF CAR
10-06-97
VERSION 04

D/S 97193 HUNTSVILLE AL
3300 GARDEN CITY GA

COLUMBUS LINE INC
HARBORSIDE FINANCIAL CENTER
PLAZA 2

COLUMBUS LINE INC
HARBORSIDE FINANCIAL CENTER
PLAZA 2

20' OPEN TOPS
INBOND IT#: V58000730B1
NOTIFY ALLEN
NOTIFY 800 687-8825 EXT
EMPTY EQUIPMENT

STACK TRAIN

SHIPPER'S CERTIFIED WEIGHT
ALLOWANCE

SHIPPER LOAD
AAR COUNT NO

9000 CONTAINER 5CV 36662 288.0000 268.00 268.00

361-030N

3286022832 10-23-97 0012830089 $268.00

(12)

MAR 24 2004

No. 02-1028

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

JAMES N. KIRBY PTY LTD D/B/A/ KIRBY ENGINEERING, MMI GENERAL INSURANCE, LTD.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONER

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(305) 571-9200

Counsel for Petitioner

* Counsel of Record

March 24, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

f/o

QUESTIONS PRESENTED

1. Whether a cargo owner that contracts with a freight forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with the carriers that actually transport the owner's goods.

2. Whether the phrase "person (including any independent contractor) whose services have been used in order to perform the contract" in a freight forwarder's multimodal bill of lading covers a rail carrier that actually transports the goods to their inland destination, regardless of whether the rail carrier is in privity with the freight forwarder.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that its parent corporation is the Norfolk Southern Corporation. No other publicly held corporation owns more than 10% of petitioner's stock.

All parties to the proceeding are listed in the caption of the case.

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OPINION BELOW

In an unpublished order, the district court granted partial summary judgment on behalf of Norfolk Southern. Pet. App. 27a-38a. The district court then issued an order certifying an appeal to the court of appeals pursuant to 28 U.S.C. § 1292(b). Pet. App. 21a-26a. The opinion of the court of appeals reversing the district court is published at 300 F.3d 1300 (11th Cir. 2002), and is reproduced at Pet. App. 1a-20a.

JURISDICTION

The court of appeals entered judgment on August 8, 2002, and denied rehearing on October 7, 2002. Pet. App. 39a-40a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT FEDERAL STATUTES

The Carriage of Goods by Sea Act (COGSA), ch. 229, 49 Stat. 1207 (1936), is codified at 46 U.S.C. app. §§ 1300-1315 and is reproduced at Pet. App. 41a-53a.

STATEMENT OF THE CASE

The court of appeals below issued two rulings that run afoul of this Court's precedent and undermine established and efficient practices in the international transportation of goods. First, the Eleventh Circuit held that an ocean carrier's bill of lading is unenforceable against the cargo owner because the bill was issued to a freight forwarder that itself had liability to the cargo owner as a carrier. This holding is contrary to 150 years of decisions of this Court squarely on point, and of every other court to address the issue, as well as the very structure of federal statutes governing maritime commerce. Second, the Eleventh Circuit improperly invoked this Court's decision in *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959), to disregard the plain language of

the bill of lading and to reform the contract in ways that have no foundation in the intent of the parties or the realities of modern multimodal transportation practices. This Court should reverse the decision below and restore the rules of law on which international transportation providers have long relied.

1. Multimodal Transportation of Goods. Beginning in the late 1950's, ocean carriers increasingly began to carry cargo in large, standard-sized containers that could be unloaded from a ship without being opened and then readily transferred to a rail flatcar or truck chassis, "a technological innovation which has had such a profound effect on [the shipping] industry that it has frequently been termed 'the container revolution.'" *NLRB* v. *International Longshoremen's Ass'n*, 447 U.S. 490, 494 (1980) ("*ILA*") ("'containerization may be said to constitute the single most important innovation in ocean transport since the steamship displaced the schooner'"); J. Mahoney, *Intermodal Freight Transportation* 13-23 (1985). By reducing costs and delays in the handling of goods and losses from damage or theft, containerization dramatically improved the efficiency of international ocean shipping. See 1 S. Sorkin, *Goods In Transit* § 1.13 (2003); *ILA*, 447 U.S. at 494-96. Ninety-five percent of U.S. trade moves by ship, and by far the dominant share of U.S. waterborne overseas trade in dollar terms is transported by container vessels.[1]

The use of containers has sparked a vast increase in international multimodal (also called intermodal) transportation, which is "'the successive carriage of a loaded container or trailer from an origin point to a destination point

[1] *See* Maritime Admin., Dep't of Transp., *Report to Congress: An Assessment of the U.S. Marine Transportation System* 2, 13-14 (1999) ("*Report to Congress*") ("Container ships carry 66 percent of the value of U.S. waterborne overseas trade and represent 11 percent of the annual tonnage"); *cf.* U.S. Br. In Support of Pet. for Cert. at 10 (28% of international waterborne cargo in this country was containerized in 2002).

by more than one mode of transportation in interstate or foreign commerce.'" 1 Sorkin, *supra* § 3.01, at 3-5 (quoting 49 U.S.C. § 501(a)(8)). Because containerization makes it easy to move cargo from one mode of transport to another, see *id.* § 1.13, at 1-86, transportation providers can offer shippers the convenience of entering into a single transaction for delivery of goods to inland destinations overseas. As the Federal Maritime Administration has observed:

> freight transportation is no longer viewed as a series of separate negotiations and arrangements with different types of freight providers such as trucking firms, railroads, and steamships. Instead, freight transportation is viewed and purchased in terms of the total trip from origin to destination, regardless of the number and type of transportation methods involved. Therefore, the U.S. marine transportation system extends beyond the waterfront, using trucks, railroads, and pipelines to receive and ship products.

Report to Congress at 29; see 1 Sorkin, *supra* § 3.01, at 3-6 ("Intermodal movements are becoming the most common form of ocean transportation service").

In the early decades of the container revolution, tight federal regulation of rates and conditions of carriage, with authority divided among different federal agencies, largely frustrated U.S.-regulated ocean carriers in offering "one-stop" shopping for overseas intermodal transportation services from origin to destination. See Mahoney, *supra*, at 17-18, 25-26. In the Shipping Act of 1984, Congress declared a national policy to minimize governmental regulation of foreign ocean commerce and to "provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices." 46 U.S.C. app. § 1701(1) & (2). Among other things, Congress authorized carriers to offer tariffed intermodal rates for transportation to and from the United States that would travel

on a single bill of lading. See *id.* app. § 1707(a)(1)(E) & (F) (requiring common carriers to set tariffs that establish rates "on any through transportation route" without any mandatory "inland divisions of a through rate," and include "any loyalty contract," "bill of lading, contract of affreightment, or other document evidencing the transportation agreement"). As the House Report stated:

> When a container moves between shipper and consignee under a single intermodal tariff, specific economies can be realized. A shipper saves time and concern associated with arranging the transfer of his cargo from one mode to another since he has to deal with only a single carrier rather than a number of carriers. For example, when a[n] ocean carrier offers an intermodal service, that carrier has the single responsibility for assuring the delivery of cargo from point to point, and only that carrier needs to be concerned with the arrangements for transferring the cargo between modes. Furthermore, this process involves a single bill-of-lading rather than multiple bills of lading.

H.R. Rep. No. 98-53, pt. 1, at 12-13 (1983), *reprinted in* 1984 U.S.C.C.A.N. 167, 177-78.[2]

Intermodal ocean transport, as it has evolved, embodies a complex chain of contracts among various entities providing transportation services at points from origin abroad to inland destinations in the United States. See M. Sturley, *The United Nations Commission on International Trade Law's Transport Law Project: An Interim View of a Work in Progress*, 39 Tex.

[2] Under the Ocean Shipping Reform Act of 1998, effective May 1, 1999, ocean carriers are no longer required to file their tariffs with the Federal Maritime Commission, but they are required to make their tariffs (including the applicable bill of lading or other document evidencing a transportation agreement) available for public inspection in an automated tariff system. *See* Pub. L. No. 105-258, § 106, 112 Stat. 1902, 1905 (codified at 46 U.S.C. app. § 1707(a)); 1 Sorkin, *supra* § 2.05[3][b].

Int'l L. J. 65, 79-80 (2003) ("*Interim View*"). Although there is infinite variation, in any given transaction an ocean carrier may contract with draymen to drop off and retrieve containers for loading with cargo; with surveyors to weigh and measure containers; with stevedores and crane operators to load and unload ships at each port; with warehousemen, watchmen, and security services; with other ocean carriers to perform all or part of the marine journey; with lift operators who load containers onto chassis and draymen who transport the container from the dock to an intermodal terminal; and with inland carriers (water, rail, or motor) to perform the inland phases of the transportation. See 1 Sorkin, *supra* §§ 1.12[3], 1.13, 1.13[2][d]; 3.01; Mahoney, *supra*, at 90-96; JA 63-64 (Hamburg Süd bill ¶ 5(b)).

An important consequence of these changes is that the water's edge has ceased to be "the critical point for the division of functions, costs, and risks." 1 T. Schoenbaum, *Admiralty and Maritime Law* § 10-4, at 590 (4th ed. 2004). The central instrument in intermodal ocean transportation is the ocean carrier's "through" bill of lading, which governs the entire transportation of the goods to final destination. See 1 Sorkin, *supra* § 3.03[2], at 3-27; *accord Mexican Light & Power Co.* v. *Texas Mexican Ry.*, 331 U.S. 731, 733-35 (1947) (holding that where a bill of lading covers transport to the final destination, it is a through bill and all connecting carriage is subject to its terms). The ocean carrier's bill of lading is "a highly important document" that "serves as a written embodiment of the terms of the contract of carriage, as a receipt for the goods, and as a negotiable document of title." G. Gilmore & C. Black, Jr., *The Law of Admiralty* § 1-5, at 13 (2d ed. 1975). It is now "standard fare" for such bills to include "Himalaya clauses" that extend liability protections to identified persons providing services under the contract of transportation. Pet. App. 11a.[3] This "contractual extension of

[3] The "Himalaya clause" takes its name from an English case popularly known as *The Himalaya*. Pet. App. 2a.

the ocean carrier's [limitation-of-liability] rights to stevedores, terminal operators, and other cargo handlers is the result of the need for uniformity of the law in the age of multimodalism." 1 Schoenbaum, *supra* § 10-8, at 613-14.

The container revolution also changed the role of freight forwarders in ocean transportation. Prior to containerization, ocean freight forwarders typically acted strictly as agents of the shipper in procuring transportation. They did not undertake responsibility for the transportation of goods; instead, they owed fiduciary duties to the shipper, and therefore, were not permitted to profit at the shipper's expense. See *United States* v. *American Union Transp.*, 327 U.S. 437, 442-43 (1946); G. Ullman, *The Ocean Freight Forwarder, The Exporter And The Law* 5 (1967). With containerization, the opportunity emerged for freight forwarders to consolidate small shipments to fill a container, and therefore to take advantage of container rates that would be far lower than the rate the vessel carrier would have charged to transport each individual shipment; forwarders could also obtain volume discounts from the vessel carriers with whom they shipped. See *Council of N. Atl. Shipping Ass'ns* v. *FMC*, 672 F.2d 171, 174 (D.C. Cir. 1982). Increasingly, many freight forwarders began contractually to assume the duties of a carrier vis-à-vis its shippers so that they would be the shippers in regard to the actual vessel carrier, and therefore profit from the rate differentials. Such freight forwarders issue their own bills of lading to the cargo owner, assume liability for the safe transportation of the goods and place shipments in their own name with the actual carrier. See 1 Sorkin, *supra* § 1.15[8]; P. Bugden, *Freight Forwarding and Goods in Transit* § 3-12, at 59 (1999); *Ariel Mar. Group*, No. 84-38, 1985 W.L. 148948, at *1 (FMC Dec. 16, 1985). In this respect, these freight forwarders came to resemble surface freight forwarders, who had long assumed the duties of a carrier in their contracts with cargo owners in order to profit from consolidating shipments. See *Chicago,*

Milwaukee, St. Paul & Pac. R.R. v. *Acme Fast Freight, Inc.*, 336 U.S. 465, 484 (1949). The freight forwarder's bill of lading, however, does not physically accompany the shipment; it does not define the terms under which the vessel carrier moves the goods; and downstream carriers and service providers generally have no reason to know that the freight forwarder bill of lading exists, much less rely upon its terms. The freight forwarder's bill of lading defines its duties to its customer, and therefore "[t]he attribution of carrier or other principal contractor status to the freight forwarder will normally be primarily of relevance to ascertaining liability to the customer for damage, loss or delay to the goods carried." Bugden, *supra* § 3-13, at 59.[4]

2. The Carriage Of Goods By Sea Act. Ocean carrier bills of lading for transportation of goods to and from the United States are governed by COGSA, and it is by force of COGSA that federal law provides the rule of decision in determining liability under carrier bills of lading. See Gilmore & Black, *supra* §§ 3-19 & -20, at 130-32; *Wemhoener Pressen* v. *Ceres Marine Terminals, Inc.*, 5 F.3d 734, 741 (4th Cir. 1993). Prior to the mid-nineteenth century,

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[4] Forwarders that assume carrier duties are referred to by "a variety of names, such as 'freight consolidator,' 'groupage operator' or 'N.V.O.C.C.'" R. De Wit, *Multimodal Transport* § 6.39, at 313 (1995); P. Jones, *FIATA Legal Handbook On Forwarding* 87 (3d ed. 2001) ("*FIATA Legal Handbook*") ("A forwarder acting as a principal to a contract of ocean carriage is now sometimes called a Non-Vessel Operating Common Carrier, or NVOCC"). Recognizing this, respondents urged the Eleventh Circuit to use the term "freight forwarder" because that was the term used by the freight forwarder here to describe itself, C.A. Aplts. Br. 6, and petitioner will abide by that convention since that is also the term used by this Court in surface transportation cases, *see infra* at 22-31. This Court should note, however, that the Shipping Act uses the term "non-vessel operating common carrier" to refer to this type of forwarder-carrier, while reserving the term "ocean freight forwarder" for the type of forwarder that simply procures transportation for a shipper as an agent but does not hold itself out as a carrier. *Compare* 46 U.S.C. app. § 1702(17)(A), *with id.* § 1702(17)(B).

parties to a contract of carriage for international transport enjoyed considerable freedom to allocate risk, subject to predominantly judge-made limitations. See D. Robertson et al., *Admiralty And Maritime Law In the United States* 317 (2001). In 1924, many of the world's maritime nations concluded the Hague Treaty "to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers . . . in international trade." *Herd*, 359 U.S. at 301. COGSA, enacted thereafter in 1936, "is the culmination of [this] multilateral effort." *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 537 (1995). Moreover, its provisions are largely modeled on the Hague Rules with the same purpose of establishing uniform and predictable rules governing risk-allocation that would be simple to apply in commerce. See, *e.g.*, S. Rep. No. 74-742, at 4 (1935); H.R. Rep. No. 74-2218, at 4-5 (1936); *accord Tessler Bros. (B.C.) Ltd.* v. *Italpacific Line*, 494 F.2d 438, 445 (9th Cir. 1974) ("One of the specific purposes of COGSA was to obviate the necessity for a shipper to make a detailed study of the fine print clauses of a carrier's regular bill of lading").

COGSA provides that "[e]very bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter." 46 U.S.C. app. § 1300. Sections 2 through 4 of COGSA, *id.* app. §§ 1302-1304, set forth the duties, rights, liabilities and immunities of the ship and the carrier as "compulsory terms" of the bill of lading. Gilmore & Black, *supra* § 3-38, at 172.

Of particular relevance here, section 4(5) of COGSA limits the liability of carriers by establishing a default rule that "[n]either the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States." 46 U.S.C. app. § 1304(5). This rule applies "unless the nature and value of

such goods have been declared by the shipper before shipment and inserted in the bill of lading." *Id.* Section 4(5) therefore protects shippers by setting a floor of $500 per package or unit below which carriers may not reduce their maximum potential liability, but "cast[s] upon the shipper the burden of declaring the nature and value of the goods, and paying a higher tariff, if necessary, if he wishe[s] to impose a higher liability upon the carrier." *Standard Electrica, S.A.* v. *Hamburg Südamerikanische Dampfschifffahrts-Gelsellschaft*, 375 F.2d 943, 945 (2d Cir. 1967).

COGSA's liability limitations apply mandatorily only to a ship or "carrier," defined as "the owner or the charterer who enters into a contract of carriage with a shipper," and only for the period "when the goods are loaded on to the time when they are discharged from the ship." 46 U.S.C. app. §§ 1301(a), (e). COGSA, however, permits shippers and carriers to make agreements governing responsibility and liability "prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea." *Id.* app. § 1307. Shippers and carriers routinely extend COGSA's liability limits by including (1) a "Clause Paramount," which, as the statute authorizes, extends the liability rules beyond the "tackle to tackle" period, and (2) a Himalaya clause, which extends the liability limitations to persons other than the carrier. See *Herd*, 359 U.S. at 302-03; *SPM Corp.* v. *M/V Ming Moon*, 965 F.2d 1297, 1305 (3d Cir. 1992); *Secrest Mach. Corp.* v. *S.S. Tiber*, 450 F.2d 285, 286-87 (5th Cir. 1971) (per curiam).

As had been anticipated in the drafting of the Hague rules adopted in COGSA, shippers routinely choose to accept COGSA's liability limitations rather than declare value, and "almost invariably" rely upon cargo insurance to cover any risk of loss. M. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5) (Part II)*, 19 J. Mar. L. & Com. 157, 174-75, 179-80 (1988) ("*Part II*"). Such insurance is not generally purchased for each shipment, but "is usually written

on an open basis, under which all shipments of the kind of merchandise described in the policy are covered." R. Holtom, *Underwriting Principles & Practices* 435 (3d ed. 1987).

3. The Contracts Of Carriage. In 1997, Respondent James N. Kirby, Pty Ltd. ("Kirby"), an Australian firm that manufactures machinery, engaged International Cargo Control Pty Ltd. ("ICC") to ship ten containers of machinery to the General Motors Corporation plant in Huntsville, Alabama. ICC, an Australian freight forwarder, is "a company that arranges for, coordinates, and facilitates cargo transport," but does not actually transport the goods in question. Pet. App. 3a.

Because it was not in the business of actually transporting goods, ICC contracted with Hamburg Südamerikanische Dampfschifahrts-Geseilschaft Eggert & Amsink ("Hamburg Süd"), an ocean carrier, for the actual transportation of the machinery from Sydney to Huntsville. Pet App. 3a-4a; JA 32 (Second Amended Complaint ¶ 9). On August 27, 1997, Hamburg Süd issued a standard-form bill of lading, under the banner of Columbus Lines and the Hamburg Süd Shipping Group, to ICC for ten containers (henceforth the "Hamburg Süd bill"). See, *e.g.*, JA 48-58. The bill identifies the "Carrier" as "Columbus Line, which is the trade name used by Hamburg Süd[]." JA 59 (¶ 1(a)). The bill was issued by Columbus Line Australia, Pty. Ltd. "as agent for the Carrier, Columbus Line," and the bill identifies ICC as the "shipper/exporter." JA 48. It further identifies the Queensland Star as the ocean vessel, Sydney as the port of loading, Savannah as the port of discharge, and Huntsville, Alabama as the place of delivery. See *id.* Accordingly, because the bill denominates Huntsville, some 300 miles inland from Savannah, as the ultimate destination for the goods, the bill constitutes a "through" bill of lading. JA 62 (¶ 4) (defining "through transportation" as when "either Place of Receipt or Place of Delivery . . . is an inland point").

The terms of the Hamburg Süd bill impose numerous obligations (including liability for payment and performance) upon the "Merchant," defined broadly to include "the shipper, consignee, receiver, holder of this Bill of Lading, *owner of the cargo* or person entitled to the possession of the cargo and the servants and agents of any of these." JA 59 (¶ 1(e)) (emphasis added). Hamburg Süd, in turn, commits to provide through transportation to the inland destination of Huntsville, which the bill recognizes "may well involve transport by rail," and authorizes Hamburg Süd to "sub-contract on any terms the whole or any part of the carriage" of the goods. JA 62, JA 63 (¶¶ 4, 5a).

The Hamburg Süd bill contains a Clause Paramount, strictly limiting Hamburg Süd's liability under the agreement to the COGSA $500 per package limitation, absent declaration by ICC of a greater value for the goods. JA 73 (¶ 17). ICC did not declare a value for the goods. JA 48. Finally, the Hamburg Süd bill included a Himalaya clause extending its liability limitations to any additional parties used to carry out the contract of carriage:

> [A]ll exemptions, limitations of, and exonerations from liability provided by law or by the Terms and Conditions hereof shall be available to all agents, servants, employees, representatives, all Participating (including inland) carriers and all stevedores, terminal operators, warehousemen, crane operators, watchmen, carpenters, ship cleaners, surveyors and all independent contractors whatsoever . . . .

JA 63 (¶ 5(b)); see also JA 60 (¶ 1(g)) (definition of "participating carrier").

On the same day (August 27, 1997) that Hamburg Süd issued its bill to ICC, ICC issued its own bill of lading to Kirby (named as consignor), noting that the goods had already been "shipped on board" the Queensland Star. JA 78-84 ("ICC bill"). Like the Hamburg Süd bill, the ICC bill

identified Sydney as the port of loading, Savannah as the port of discharge, and Huntsville as the place of delivery. JA 78.

ICC utilized the standard form developed by the International Federation of Freight Forwarders Association ("FIATA"): the FIATA Multimodal Transport Bill of Lading, commonly referred to as the "FBL." Pet. App. 8a; see also attached Addendum (setting forth FBL "Standard Conditions"). Among freight forwarders, the FBL is "the world's most frequently used multimodal transport document." *FIATA Legal Handbook*, at 42. As the issuer of the bill, ICC is the "Freight Forwarder," which is defined as the "Multimodal Transport Operator who issues this FBL and is named on the face of it and assumes liability for the performance of the multimodal transport contract as a carrier." JA 85 ("Definitions").

The contract specifically contemplates that ICC may engage other carriers to perform the contract, as it did:

> By issuance of this FBL the Freight Forwarder a) undertakes to perform *and/or in its own name procure the performance of the entire transport*, from the place at which the goods are taken in charge (place of receipt evidenced in this FBL) to the place of delivery designated in this FBL [and] b) assumes liability as set out in these conditions.

JA 86 (¶ 2.1) (emphasis added). The FBL provides further that, subject to other conditions, the Freight Forwarder "shall be responsible for the acts and omissions of his servants or agents acting within the scope of their employment, or *any other person of whose services he makes use for the performance of the contract evidenced by this FBL*, as if such acts and omissions were his own" in any "period from the time the Freight Forwarder has taken the goods in his charge to the time of their delivery." JA 86, JA 89 (¶¶ 2.2, 6.1) (emphasis added).

The FBL contains a Clause Paramount, which extends the applicability of mandatory laws and conventions, as well as a liability limitation clause. JA 91-93 (¶¶ 7, 8). The latter defines various rules for limiting the forwarder's liability in the absence of a declaration by Kirby of the true value of the goods and corresponding payment of a higher freight rate, and declares that the forwarder's liability will be governed by COGSA where applicable. JA 92, JA 93 (¶¶ 8.3, 8.6(b)). By not declaring the value of the goods, JA 78, Kirby elected to accept the FBL liability limitations and instead insured the shipment with Respondent MMI General Insurance Limited ("MMI"), Pet. App. 28a.

The FBL also contains a Himalaya clause, which extends these liability limitations to other parties used by ICC to perform the contract:

> These conditions apply whenever claims relating to the performance of the contract evidenced by this [bill of lading] are made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract, whether such claims are founded in contract or in tort, and the aggregate liability of the Freight Forwarder and of such servants, agents or other persons shall not exceed the limits in [the Clause Paramount].

JA 93-94 (¶ 10.1).

Finally, an additional clause in the FBL recognizes that "[i]n entering into this contract . . . , the Freight Forwarder, to the extent of these provisions, does not only act on his own behalf, but also as agent or trustee for such persons, and such persons shall to this extent be or be deemed to be parties to this contract." JA 94 (¶ 10.2); see J. Ramberg, *The Law of Freight Forwarding and the 1992 FIATA Multimodal Transport Bill of Lading* 67 (1993). Thus, by its very terms, the FBL purported to make persons (including independent contractors) "used in order to perform the contract" parties to

the ICC-Kirby contract of carriage. JA 94 (¶ 10.1); see Ramberg, *supra*, at 66.

Hamburg Süd's ship carried Kirby's machinery from Sydney to Savannah, Georgia. At Savannah, petitioner Norfolk Southern, which had been hired by the American arm of Hamburg Süd to transport the goods via train to their final destination, took over the containers for delivery to Huntsville, Alabama. The train carrying the containers derailed, allegedly causing approximately $1.5 million in damage to the machinery. Pet. App. 4a. Kirby recovered from its insurer, Respondent MMI. See *id.* at 4a n.4.

4. District Court Proceedings. Respondents filed a diversity suit against Norfolk Southern in the United States District Court for the Northern District of Georgia. Respondents advanced claims sounding in negligence, recklessness, bailment, and, in the alternative, breach of contract. JA 33-38. Respondents requested an award encompassing the full amount of the asserted damage caused to its machinery by the derailment as well as punitive damages. JA 38. In its answer, Norfolk Southern asserted, among other things, that respondents' claims were preempted by federal law and the railroad's liability, if any, was no greater than the $500 per package COGSA limitation incorporated by the relevant bill of lading. JA 42.

Soon thereafter, Norfolk Southern moved for partial summary judgment on the liability issue and to dismiss Respondents' state law claims. The district court granted the motion in both respects, concluding that the Himalaya clause in the Hamburg Süd bill of lading, which by its terms encompassed "inland carriers," covered Norfolk Southern and limited the railroad's potential liability to Kirby to $500 per container. Pet. App. 36a-37a. The district court likewise concluded that Respondents' state law claims were preempted by federal law. See *id.* at 37a.

The district court rejected the plaintiffs' argument that Kirby could not be bound to the agreement entered into by ICC with Hamburg Süd. After observing that "ICC does not transport cargo, but rather arranges for cargo transportation by carriers," Pet. App. 28a, the district court relied upon this Court's decision in *Great Northern Railway* v. *O'Connor*, 232 U.S. 508 (1914), to hold: "One who contracts with others to make arrangements for the transportation of his goods is bound by the terms of the contract entered into on his behalf," Pet. App. 37a. Thus, the court concluded, Kirby was bound by the Hamburg Süd bill, which covered transport of Kirby's goods through to Huntsville and specifically referenced "'inland[] Carriers.'" See *id.* at 36a-37a. The parties jointly requested certification for interlocutory appeal to avoid the expense of trial if Norfolk Southern's liability were subject to COGSA limits. The district court certified the case to the Eleventh Circuit pursuant to 28 U.S.C. § 1292(b), and that court granted review. Pet. App. 25a, 6a.

5. Decision Of The Court Of Appeals. A divided panel of the Eleventh Circuit reversed. Pet. App. 2a. The court first addressed the question whether Kirby was bound by the Hamburg Süd bill of lading. The court of appeals did not dispute that Norfolk Southern was covered by the plain terms of the Hamburg Süd bill's Himalaya clause, which covered "'participating (*including inland*) carriers,'" but held that Kirby would not be bound by the Hamburg Süd bill unless ICC had acted as Kirby's agent when it received the bill. See *id.* at 6a, 7a, 17a. The Eleventh Circuit held that "ICC was acting as a carrier – a principal – not as Kirby's agent" in contracting with Hamburg Süd. According to the court of appeals, "[i]f ICC had been acting as Kirby's agent, there would have been only one bill of lading, issued by Hamburg Süd to Kirby and listing Kirby as the shipper." *Id.* at 7a-8a. The court found its conclusion buttressed by the terms of the ICC bill that authorize ICC to procure transportation "'in its

own name'" and that declare that ICC has assumed the liability to Kirby as a carrier. *Id.* at 8a-9a (emphasis omitted).

Turning next to the ICC FBL to which Kirby clearly was a party, the court of appeals held that Norfolk Southern could not claim protection under its Himalaya clause either. This result followed, the court observed, because "the language of the clause does not specifically identify Norfolk Southern as a member of a well-defined class of its beneficiaries." Pet. App. 11a (citing *Herd*, 359 U.S. at 302). The court rejected Norfolk Southern's reliance on the Himalaya clause's extension of liability limitations to "'any servant, agent *or other person (including any independent contractor) whose services have been used in order to perform the contract.*'" Pet. App. 11a-13a (emphasis added). The Eleventh Circuit found the italicized language (save the parenthetical) "too vague" to pass its "clarity of language requirement." *Id.* at 12a. According to the court, "[t]his leaves, then, a Himalaya clause that extends to 'any servant, agent, or . . . any independent contractors.'" *Id.* It then held that Norfolk Southern (although an independent contractor) could not benefit from this phrase because it had not been hired by the freight forwarder. "In this Circuit, . . . the law requires privity between the carrier and the party seeking shelter in the Himalaya clause." *Id.* at 13a-14a. Under *Herd*, moreover, the Eleventh Circuit interpreted the Himalaya clause to lack the "linguistic specificity" necessary to cover inland carriers, notwithstanding the fact that the bill was a "'through bill'" designating an inland point as the final delivery destination. See *id.* at 15a-16a.

Judge Siler dissented on both issues. First, he deemed it irrelevant that there were two bills of lading, noting that the "bill of lading between Kirby and ICC put Kirby on notice that ICC would have to employ other entities to transport the freight." Pet. App. 19a. Because Kirby fully expected and knew that ICC would contract with actual carriers to transport

the cargo, ICC could only have been acting as agent for Kirby in making those arrangements. See *id.*

Second, Judge Siler concluded that Norfolk Southern should in any event enjoy the protections of the Himalaya clause in the ICC bill, which covers "independent contractors" without qualification. Noting again that "Kirby knew that an inland carrier would have to be used" in order to transport the goods to Huntsville, the dissent opined that Kirby must have "agreed to a limitation of liability for the carrier" that would accomplish the last leg of the journey. Pet. App. 19a. Embracing what he viewed as the better rule followed by the Ninth Circuit, which focuses on "'the nature of the services performed compared to the carrier's responsibility under the carriage contract,'" Judge Siler concluded that the ICC bill's Himalaya clause protected Norfolk Southern. *Id.* at 20a (quoting *Akiyama Corp.* v. *M.V. Hanjin Marseilles*, 162 F.3d 571, 574 (9th Cir. 1998)). The majority gave a "windfall" to Kirby's insurer based on a "technicality," while ignoring both that "Kirby knew from the start that the ultimate destination would have to be through an inland carrier" and that Kirby "agreed to the limitation of liability on the part of ICC and all of its sub-contractors." *Id.*

SUMMARY OF ARGUMENT

The Eleventh Circuit's decision has struck a double blow against carriers and other service providers in international commerce. In conflict with the precedents of this Court, and every other court to address the issue, it has wrongly held that a vessel carrier's bill of lading issued to a freight forwarder (including its Himalaya clause) is unenforceable against the cargo owner. It has also improperly converted this Court's decision in *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959), into a license for contract reformation, invoking hyper-technical rules to defeat contract language and the parties' clearly expressed intent.

I.

The court below erroneously held that when Kirby engaged the freight forwarder ICC to ship its goods, ICC did not act as an agent on behalf of Kirby in its dealings with the *actual* carrier of the goods (Hamburg Süd) because ICC had assumed the status of a carrier with respect to Kirby. This position was rejected more than a century and a half ago when this Court held that the liability limitation clause in a contract of carriage between a nonvessel carrier and a vessel carrier was binding upon the owner of the cargo, even if the nonvessel carrier had contracted in its own name and had assumed liability for the goods. The nonvessel carrier had the "possession of the owner" and was "considered in law the agent or servant of the owner" in placing the owner's goods with the vessel carrier; therefore, its contract with the vessel carrier was "in contemplation of law" a contract between the cargo owner and the vessel carrier. *New Jersey Steam Navigation Co.* v. *Merchant's Bank*, 47 U.S. (6 How.) 344, 380 (1848). This Court has consistently reaffirmed this rule, regardless of the dealings of the cargo owner and forwarder *inter se*. As this Court ruled in holding a cargo owner bound by a contract that a forwarder had executed in its own name with a rail carrier, it was enough that the forwarder "*had been intrusted with goods to be shipped by railway*, and, nothing to the contrary appearing, the carrier had the right to assume that the [forwarder] could agree upon the terms of the shipment." *Great N. Ry.*, 232 U.S. at 514 (emphasis added).

More recently, in analysis diametrically opposed to that of the Eleventh Circuit, this Court held that it was immaterial whether the forwarder had issued its own bill of lading, assumed carrier liability for the transportation of the goods, and contracted in its own name with the actual carrier. This Court recognized the "duality of character" of such a forwarder, who assumes carrier responsibilities to the cargo owner, but is a shipper in its dealings with actual carriers. *Acme Fast Freight*, 336 U.S. at 468, 478-80. Because

forwarders are shippers (not carriers) in contracting with rail carriers, this Court held that the cargo owner was bound to the contract made by the forwarder. See *id.* at 480-87. The cargo owner has authorized the forwarder to ship its goods by rail carrier and accordingly, the cargo owner "is the undisclosed principal of its agent, the forwarder, in the latter's contract with the carrier." *Id.* at 488 n.27 (citing *New Jersey Steam*, 47 U.S. (6 How.) 344, and *Great No. Ry.*, 232 U.S. 508).

This rule has been applied across all modes of transport, including under the Shipping Act, which governs all transactions in ocean commerce to and from the United States, including this one. A nonvessel common carrier (NVOCC) is explicitly recognized by statute as "a common carrier that does not operate the vessels by which the ocean transportation is provided, and *is a shipper in its relationship with an ocean common carrier.*" 46 U.S.C. app. § 1702(17)(B) (emphasis added). In accord with *Acme Fast Freight*, courts recognize that an NVOCC acts as "the agent of the cargo owner/shipper when it contracts with the ocean carrier to ship the cargo owner's goods." See, *e.g.*, *Kukje Hwajae Insurance Co.* v. *M/V Hyundai Liberty*, 294 F.3d 1171, 1176 (9th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3400 (Nov. 22, 2002) (No. 02-813). Indeed, the ocean carrier's bill of lading by statute must be included in its published tariffs, and it would be discriminatory for different liability limitations to apply to shipments by nonvessel carriers than to shipments by others.

The Eleventh Circuit's rule not only contravenes precedent, but it undermines COGSA and the efficient trading practices that have arisen under the clean standards of existing law, where cargo owners are bound by any contract entered into by a person with authority to ship the goods by carrier. COGSA operates by imposition of mandatory terms, including liability limitations, in bills of lading. If the ocean carrier's bill of lading is unenforceable against the cargo owner, the real party-in-interest in any contract for transportation of its

goods, the statute is effectively nullified. Current law, moreover, is extraordinarily efficient for all concerned. In the usual case where the value of goods is undeclared, carriers and their subcontractors (to whom COGSA limits are extended by Himalaya clauses in the ocean carrier's bill of lading) can rely on limited liability in charging lower rates; they need not identify the owners of goods and contract separately with them, which is not only a practical impossibility but in many circumstances unlawful. Shippers benefit from this scheme, receiving lower rates and relying on cargo insurance to cover any risk of loss. Cargo insurers in turn are compensated fully by their premiums charged for the risk of loss beyond the COGSA limit. The Eleventh Circuit's aberrant holding is not only contrary to law, but it gives cargo owners and insurers (like respondents) a wholly unwarranted windfall at the expense of carriers, destroys the certainty in the allocation of liability that COGSA intends to provide, and, if upheld, will lead to a host of inefficient and imperfect attempts on the part of carriers to mitigate their risks. This Court should restore certainty by deciding this case on the basis of the first question presented and by affirming the law established by its precedents.

II.

The court below also erred by holding that Norfolk Southern could not invoke the protections of the Himalaya clause of the ICC FBL, which extends liability limitations to "any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract." Pet. App. 59a. The Eleventh Circuit's holding rests on a fundamental misreading of *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959). *Herd* enjoins courts to determine what liability limitations "the contracting parties intended" and "in some way have expressed it in the contract," looking first to the plain language of the instrument; its rule of strict construction applies only if the limitation clause is ambiguous. *Id.* at 302,

305; see *Texas & Pac. Ry.* v. *Reiss*, 183 U.S. 621, 626 (1902). *Herd* does not authorize a court to rewrite the contract, as the Eleventh Circuit unabashedly did here; the court impermissibly struck as "too vague" the categorical contract language extending carrier liability limitations to '"'any . . . other person whose services have been used in order to perform the contract.'" Pet. App. 12a (omission in original).

Nor does *Herd* permit a court to construe the phrase "any independent contractor" to exclude an independent contractor like Norfolk Southern just because it happens to be an inland carrier not in privity with the freight forwarder. Such a construction runs contrary to the language of the contract and the intent of the parties; indeed, it is a manifestly absurd interpretation of a self-described "multimodal transport contract" with an inland destination, JA 74, where inland carriage by third parties is contemplated, and almost all service providers in the chain of international transportation are not in privity with the freight forwarder. In all events, such a construction cannot be maintained because the persons covered by the Himalaya clause are also the only persons for whose acts and omissions the freight forwarder (as carrier) assumes liability. The Himalaya clause and the carrier responsibility clause are both meant to cover comprehensively all persons performing services under the "multimodal transport contract," and it would be against all principles of strict construction to interpret a contract of adhesion expansively in favor of the contracting carrier. The Eleventh Circuit's arbitrary application of *Herd* to defeat the intent of the parties is wrong as a matter of law.

ARGUMENT

I. KIRBY IS BOUND BY THE TERMS OF THE HAMBURG SÜD BILL OF LADING.

Norfolk Southern carried Kirby's cargo under the through bill of lading issued by Hamburg Süd, the ocean carrier, to

ICC, the freight forwarder employed by Kirby. The Eleventh Circuit acknowledged that the Himalaya clause of the Hamburg Süd bill by its terms covers "participating (including inland) carriers." JA 63 (¶ 5(b)), like Norfolk Southern. Pet. App. 17a. The Eleventh Circuit nonetheless held that the Hamburg Süd bill (and the contract of carriage manifest therein) was unenforceable against Kirby because the bill was issued to ICC, not Kirby. The Eleventh Circuit relied solely on the ICC's assumption of the duties of a carrier with respect to Kirby. Pet. App. 7a-8a. From this undisputed fact, the Eleventh Circuit held that ICC could not have been Kirby's agent in contracting with the actual carriers who would transport Kirby's goods. See *id.* at 7a. This holding is contrary to 150 years of common carrier law, including precedents of this Court directly on point. A freight forwarder, even if a carrier in relation to the cargo owner, is a shipper in relation to the actual carrier, and is therefore the agent of the owner in contracting with the actual carrier to carry the owner's goods.

A. Decisions Of This Court Require Enforcement Of The Hamburg Süd Bill Of Lading Against Kirby.

For more than 150 years, this Court has recognized that when a carrier issues a bill of lading to a freight forwarder, the carrier is entitled to enforce the terms of that bill against both the freight forwarder and the owner who authorized the freight forwarder to ship his goods. This rule prevails whether or not the forwarder contracts with the actual carrier in its own name, issues its own bill of lading, or otherwise assumes the duties of a common carrier with respect to the owner. The question that the Eleventh Circuit thought "pivotal," Pet. App. 7a – whether ICC was Kirby's carrier – is, under this Court's decisions, legally irrelevant. Hamburg Süd's bill of lading is enforceable against Kirby regardless of how Kirby and ICC structured their dealings *inter se*.

1. The Court first applied this controlling rule of law in *New Jersey Steam Navigation Co.* v. *Merchant's Bank*, 47

U.S. (6 How.) 344 (1848). In that case, William Harnden "was engaged in the business of carrying for hire small packages of goods . . . for any persons choosing to employ him" between Boston and New York. *Id.* at 379. Merchant's Bank hired Harnden to transport specie from New York to Boston. See *id.* at 379-80. Harnden did not himself transport the goods. Rather, he contracted in his own name with the steam vessel owners to carry a crate containing his shipments at a monthly rate. See *id.* at 379. The contract between Harnden and the vessel owners provided that the latter assumed no liability for loss of the goods; Harnden was to inform the shipper that Harnden assumed the risk of loss. See *id.* When the vessel sank, the bank (and its directors) sued the vessel owners to recover the lost specie.

The vessel owners argued that the bank libellants had no right of action against them because "there is no contract – no privity of contract – between them and us." *Id.* at 366 (brief of plaintiffs in error). This Court rejected that argument, holding that "the contract between Harnden and the [vessel owners] for the transportation of the specie was, in contemplation of law, a contract between them and the [bank]; and although made in his own name, and without disclosing his employers at the time, a suit may be maintained directly upon it in their names." *Id.* at 380. This Court expressly considered and rejected the argument – advanced by Kirby here – that the result turned on whether Harnden's contract with the bank established a common carrier relationship between Harnden and the bank, or an ordinary agency relationship between them. According to this Court, if Harnden was a simple agent, he "clearly" could bind the bank to a contract with the vessel owners. *Id.* Even if he was a carrier, moreover, he was "*considered in law the agent or servant of the owner*, and the possession of the agent is the possession of the owner." *Id.* (emphasis added). This Court held that the contractual limitation of the vessel owner's liability in its contract with Harnden was binding on the cargo

owners, see *id.* at 384 (the vessel carriers "succeeded in restricting their liability as carriers by the special agreement"), but interpreted the liability clause not to extend to the gross negligence proven at trial, see *id.* at 382-84.[5]

Put simply, *New Jersey Steam* stands for the proposition that a carrier may enforce the lawful terms of its contract of carriage with an intermediary authorized to ship the owner's goods (ICC here) against the cargo owner (Kirby). This is so even if the intermediary contracted in its own name with the vessel carrier, and even if the intermediary is also a carrier with respect to the cargo owner.

This Court has never wavered from the *New Jersey Steam* rule. In *York Co.* v. *Central R.R.*, 70 U.S. (3 Wall.) 107 (1865), Trout & Son entered into a contract in its own name with a railroad for steamship carriage from Memphis to Boston of a shipment of cotton owned by York. See *id.* at 107-08. The contract of carriage, by the terms of the bill of lading issued by the railroad to Trout & Son, exempted the railroad from liability for loss due to fire. See *id.* at 107. After the cargo was destroyed by fire in transit, York sued the railroad, alleging that the railroad had common-law liability as a common carrier for the full value of the goods for failure to deliver the goods safely. It argued that although Trout & Son "had authority to ship, [they] had no authority to agree to any restriction on the carriers' common liability," and "[t]heir authority to forward was certainly, of itself, not an authority to make an unusual and special contract" binding upon the owner. *Id.* at 108-10. This Court nonetheless enforced the limitation of liability against the cargo owner, noting that the rule that a common carrier may limit by special contract its

[5] Five justices concurring in the judgment agreed that the cargo owners were bound by the subcontract, *see also New Jersey Steam*, 47 U.S. (6 How.) at 393 (Catron, J.), and the plurality opinion is the holding of the Court because it supplies the narrowest ground for decision among the concurring justices, *see Marks* v. *United States*, 430 U.S. 188, 193-94 (1977).

liability for carriage of goods, and therefore reduce its duties to that of an ordinary bailee, had "received the sanction of this court" in *New Jersey Steam*. *Id.* at 111-12. Trout & Son's authority to ship the goods constituted the owner's assent to the express contract limiting liability, even though the owner did not contract directly with the railroad, no agency relationship was disclosed to the carrier, the contract was in the name of Trout & Son only, and Trout & Son had acted beyond their authority as agents in agreeing to the special contract. See *id.* at 112-13. The railroad was entitled to rely upon the terms of its contract of carriage, for "[s]o far as the defendant could see, [Trout & Son] were themselves the owners." *Id.* at 113. A cargo owner is bound by the contracts between a carrier and a third party who has authority from the owner to ship its goods with that carrier. See also *Reid* v. *Fargo*, 241 U.S. 544, 545, 551 (1916) (enforcing steamship's liability limitation against the cargo owner, even though the express company/forwarder had issued its own bill of lading, contracted with the steamship in its own name and failed to declare value as the owner had wanted).

2. This Court has also consistently applied the *New Jersey Steam* rule in cases involving surface carriers. It has definitively rejected the Eleventh Circuit's position that a freight forwarder that has assumed the duties of a carrier vis-à-vis the cargo owner cannot bind the cargo owner in contracting with the actual carrier to transport the owner's goods.

In surface as well as marine transportation, freight forwarders initially performed limited functions on the cargo owner's behalf, assuming only the duties of an agent to its shipper. This type of forwarder (deemed by this Court an "agent-forwarder") "went no farther than procuring transportation by carrier and handling the details of shipment." *Acme Fast Freight*, 336 U.S. at 484. "When goods handled by an agent-forwarder were lost or damaged, it

was liable to the shipper only for its own negligence, including negligence in selecting a carrier." *Id.* at 484-85.

By the middle of the nineteenth century, however, a different kind of freight forwarder began to emerge, structuring its relations with the cargo owner differently so as to profit from the consolidation of shipments from multiple owners. "The freight forwarder charged a rate covering the entire transportation" and "held itself out not merely to arrange with common carriers for the transportation of the goods, but rather to deliver them safely to the consignee." *Id.* at 484 & 485 n.23. The forwarder "operate[d] upon the margin of profit represented by the difference between railroad carload rates paid by the forwarder and the higher rates, approximating less than carload rates, which the forwarder charged the owner of a shipment." *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 346 (1940).

It was essential to the forwarder that the customer be at least indifferent as to whether it would transact with the forwarder or the actual carrier, and so commonly the forwarder's contracts with the customer evolved to mirror those of the actual carrier. The forwarder accordingly would issue to his customer "his own contract corresponding in form to through bills of lading and assume[] responsibility for safe through carriage." *Id.* at 345. Because such forwarders held themselves out to the public to transport goods for hire with responsibility for safe delivery of the goods, which was the common-law standard for common carriage, courts by at least 1850 began to affix the legal duties of common carriers upon them even though they operated no vessel or vehicle that would actually transport the goods. See, *e.g.*, *Acme Fast Freight*, 336 U.S. at 484-85 & n.23; *Krender* v. *Woolcott*, 1 Hilt. (N.Y.) 223 (1856); *Teall* v. *Sears & Griffith*, 9 Barb. 317, 320-22 (N.Y. Gen. Term 1850). As this Court stated, when the freight forwarder "contracted to deliver the goods to the consignee at rates set by itself,"

> the forwarder was subjected to common carrier liability for loss or damage whether it or an underlying carrier had been at fault. The fact that the forwarder did not own the carriers whose services it utilized was held to be immaterial. Its undertaking was to deliver the shipment safely at the destination. Common carrier liability was the penalty for failure of fulfillment of that undertaking.

Acme Fast Freight, 336 U.S. at 485 (footnote omitted).

Even though the forwarder assumed the duties of a common carrier towards the owner of the goods, it was not regarded in law as equivalent to an actual carrier in its dealings with such carriers. The forwarder's principal function was still shipping (not transportation) in dealing with the carriers, even though it had restructured its relationship with its customers to allow it to arbitrage (and profit from) rate differentials: "Forwarders utilize common carriers by rail and motor truck to transport *goods owned by others*." *Chicago Heights*, 310 U.S. at 345 (emphasis added). They "arrange[] for the pickup, assembly and transportation of the shipments by carriers for hire," and "forwarders, not the owners of the goods, select the carriers and route the shipments." *Id.* at 345-46. Because the forwarder performed essentially a shipping function, and not transportation, this Court had no trouble ruling that forwarders were shippers in placing freight with the actual carrier, and the carriers were to treat their shipments no differently from other shipments (such as those placed by the owners themselves).[6]

Given that the cargo owner entrusts the freight forwarder with authority to ship its goods, this Court early on held that

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[6] *See ICC* v. *Delaware, Lackawana & W. R.R.*, 220 U.S. 235, 252-53 (1911) ("nothing in the duties of a common carrier by the remotest implication can be held to imply the power to sit in judgment on the title of the prospective shipper who has tendered goods for transportation"); *accord Lehigh Valley R.R.* v. *United States*, 243 U.S. 444, 445 (1917) ("although the [freight forwarder of goods from overseas] may be in no case the owner, that does not concern the [carrier]").

the cargo owner was bound by the contract of carriage that the freight forwarder (as shipper) had entered into with the actual carrier. See *Great N. Ry.*, 232 U.S. at 514-15. In the *Great Northern Railway* case, O'Connor contracted to have personal goods shipped with the Boyd Transfer Company, a transfer company and freight forwarder that "d[id] business in the nature of a common carrier," shipping consolidated cargo and receiving bills of lading from the railroad "in its name." *O'Connor* v. *Great N. Ry.*, 136 N.W. 743, 744 (Minn. 1912), *rev'd, Great No. Ry.*, 232 U.S. 508 (1914). Boyd did not itself carry the goods, but contracted in its own name with the railway, and accepted a limitation on the railway's liability for less than the actual value of the goods being shipped (and the consequent reduction in shipping rate from the railway). See 232 U.S. at 513. The terms of O'Connor's contract with Boyd were "not stated," *id.* at 509, but O'Connor claimed that she had not authorized Boyd to consolidate her shipment with others or to accept the limitation on the railway's liability, see *id.* at 510. Indeed, O'Connor had indicated to Boyd that as she had no insurance, "she was willing to pay the regular rates." *Id.* When the goods were lost in transit, O'Connor sued the railway for the full value of the goods.

This Court held that the railroad's limitation on liability was enforceable against the owner. It was enough that the forwarder "*had been intrusted with goods to be shipped by railway*, and, nothing to the contrary appearing, the carrier had the right to assume that the Transfer Company could agree upon the terms of the shipment, some of which were embodied in the tariff." *Id.* at 514 (emphasis added). This Court reached this conclusion without determining whether Boyd was an ordinary agent or a common carrier with respect to O'Connor. See *id.* at 509. The terms of that relationship, far from "pivotal," as the Eleventh Circuit supposed, Pet. App. 7a, were irrelevant. For this Court, the same outcome prevailed "whether [Boyd] be treated as agent or Forwarder." 232 U.S. at 514. In either event, "[t]he carrier was not bound

by her private instructions or limitation on the authority of the Transfer Company." *Id.* By entrusting its goods to the forwarder for shipment by a common carrier, the cargo owner authorizes the freight forwarder to bind it to the carrier's terms of carriage.

This Court reaffirmed this rule in *Acme Fast Freight*. That case concerned the Freight Forwarder Act of 1942, an amendment to the Interstate Commerce Act ("ICA"), which for the first time regulated freight forwarders. The 1942 Act mandated that "the forwarder issue bills of lading to its shippers, covering transportation of the individual shipments to their ultimate destinations," and making the forwarder "liable to its shipper for loss or damage to the freight exactly as if it were an initial carrier" regulated under other parts of the ICA. 336 U.S. at 469. The question in *Acme Fast Freight* was whether the railroad was still entitled to rely on its own bill of lading (and in particular a limitation on its liability to claims filed within nine months of the loss), or whether its liability would be determined by the terms of the freight forwarder's bill of lading. See *id.* at 469-70, 480.

This Court held that the terms of the actual carrier's bill of lading must be enforced. The 1942 Act was "not intended to change the shipper-carrier relationship that had for many years existed between forwarder and railroad." *Id.* at 470. A forwarder that issues its own bill of lading to the cargo owner and assumes liability for the entire transit "has some of the characteristics of both carrier and shipper." *Id.* at 467. "In their relations with shippers, forwarders unquestionably perform functions and have duties similar to the functions and duties of common carriers," but "forwarders occupy a different position in their dealings with the carriers whose services they utilize." *Id.* at 477-80. They remain "shippers *vis-à-vis* carriers," and were not equivalent in law to initial carriers, or express companies that purchase capacity from rail carriers. *Id.* at 478-80 & n.17. When the forwarder argued "that the liability provisions of the uniform rail bill of

lading issued to the forwarder for his carload shipment may be disregarded," and "that the railroad need not issue its bill of lading at all." *id.* at 479, this Court responded that it could not "believe that the contention is seriously made. The underlying carrier's haul involves a different shipment, a different consideration, a different origin, a different destination, and a different consignor and consignee than are involved in the forwarder's undertaking." *Id.* at 480. The Court, citing *New Jersey Steam* and *Great Northern Railway*, emphasized that the carrier's contract governed its liability both to the forwarder and to the forwarder's shipper (*i.e.*, the cargo owner or consignor), for that "shipper is the undisclosed principal of its agent, the forwarder, in the latter's contract with the carrier." *Id.* at 488 n.27.

Indeed, this Court has never held a bill of lading binding only on the named shipper. Rather, it has always recognized that "the bill of lading is a contract between the transportation company *and him who is interested in the shipment*." *Michigan Cent. R.R.* v. *Mark Owen & Co.*, 256 U.S. 427, 430 (1921) (emphasis added) (suit by consignee). It matters not whether the owner is consignor or consignee, see *Railroad Co.* v. *Androscoggin Mills*, 89 U.S. (22 Wall.) 594 (1874) (enforcing liability limitation against consignee who did not contract with the carrier); see also *Constable* v. *National S.S. Co.*, 154 U.S. 51 (1894) (same); A. Dobie, *Handbook on the Law of Bailments and Carriers* § 154, at 499-500 (1914), or uses an intermediary to ship its goods.

This Court's cases, involving both marine and surface carriage, are accordingly dispositive of the issue in this case. Contrary to the Eleventh Circuit's analysis, Pet. App. 7a-9a, it is simply irrelevant that a freight forwarder does not act strictly as an "agent-forwarder," that it issues its own bill of lading, that it contractually assumes the liability of a carrier for the entirety of the journey from origin to destination, that it selects the actual carrier, and that it contracts with that carrier in its own name and for its own profit. The forwarder

is authorized to ship the owner's goods with an actual carrier, and therefore the owner is "the undisclosed principal of its agent, the forwarder, in the latter's contract with the carrier." *Acme Fast Freight*, 336 U.S. at 488 n.27; *Great N. Ry.*, 232 U.S. at 514. Furthermore, the carrier's limitation on liability applies regardless of whether the cargo owner attempts to sue in tort or in contract. See *Queen of the Pacific*, 180 U.S. 49, 53 (1901) (stating that it would be "unreasonable" to hold that a provision in a bill of lading requiring claims to be filed within 30 days "should apply if the action were in contract, but should not apply if it were in tort"); *Nippon Fire & Marine Ins. Co.* v. *Skyway Freight Sys., Inc.*, 235 F.3d 53, 61 (2d Cir. 2000); Dobie, *supra* § 155, at 504. Indeed, cargo owners have never been allowed to escape a contractual limitation on liability based on claims that they were not parties to the contract, so long as they consented to shipment of their goods by that carrier: "Where . . . goods have been shipped with the consent of the owner, though not under contract with him, he will not be in a position to claim against the shipowner for the consequences of a tortious act, if the shipowner is exempted from liability for such acts by the contract with the shipper." T. Carver, *A Treatise On the Law of Carriage of Goods By Sea* § 67, at 93 (7th ed. 1925) (citing common-law cases).[7]

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[7] The Eleventh Circuit's position is also inconsistent with basic principles of bailment, which are not limited to the special circumstance of freight forwarders. Bailment requires a voluntary acceptance of possession of goods owned by another; "[t]he bailee must consent to possession of the goods." Bugden, *supra*, at 166, 168. The carrier's bill of lading represents the terms on which it consents to possession and carriage of the goods, *see* Dobie, *supra* § 125, at 374, and the carrier bill may be enforced against the cargo owner if the owner has granted another the general authority to ship the goods with such a carrier, *see The St. Hubert*, 107 F. 727, 732 (3d Cir. 1901) (holding that the acceptance of a bill of lading that contained a limitation of liability provision by an original carrier from a subsequent carrier "may be considered within the general powers conferred upon the original carriers by the shippers and

B. The Rule That The Owner Is Bound By The Freight Forwarder's Contracts With The Actual Carrier Applies Across All Modes of Transport.

The law described above is so settled on this point that a leading treatise on the transport of goods states the rule in unequivocal terms as applying to all modes of transport. Whether transport is by air, rail, sea or motor carrier, the rule is the same. The contract in a bill of lading issued to a freight forwarder is effective against a shipper even when the shipper is not named on the carrier's bill issued to the forwarder and lacks direct privity with the actual carrier.[8]

In particular, courts have long held that the *New Jersey Steam/Acme Fast Freight* rule is applicable to ocean carriage under the Shipping Act. As noted above, the container revolution provided a financial incentive for freight forwarders dealing with ocean carriers to consolidate smaller shipments into a single, full container shipment which they

owners, even without the express evidence alluded to of knowledge of and acquiescence in the" subsequent carrier's bill).

[8] *See* 1 Sorkin, *supra* §§ 5.32[1], at 5-264 (stating that for goods transported by sea "the shipper and the consignee of the goods are bound by the terms of the bill of lading issued by the actual carrier to the NVOCC, including the limitation of liability contained in the actual carrier's bill of lading"); *id.* § 5.34[1], at 5-272 (stating that for goods transported by motor carrier or rail "[t]he customer of the freight forwarder . . . remains subject to the terms of the bill of lading and tariffs of the actual carrier including limitations of liability, requirements for notice of claim, and limitation of action provisions" even when the "original shipper was not a named party to the bill of lading or contract made by the motor carrier or rail carrier") (footnotes omitted); 3 *id.* § 13.07[1], at 13-122 (stating that limitation of liability in air waybill applies "even where the suit is brought by a plaintiff who is not a party to the contract of carriage"); *see generally Nippon Fire*, 235 F.3d at 61 ("common carriers are entitled to assume 'that one presenting goods for shipment either owns them or has authority to ship them,'" and therefore the primary carrier is the "agent" of the shipper in contracting with secondary carriers); *Puerto Rico Mar. Shipping Auth.* v. *Crowley Towing & Transp. Co.*, 747 F.2d 803, 804-05 (1st Cir. 1984) (same).

ship in their own (forwarder's) name with the ocean carrier, just as their surface freight forwarder counterparts had done with surface carriage. See *ILA*, 447 U.S. at 496 n.8. The Federal Maritime Bureau, the predecessor to the Federal Maritime Commission, examined this kind of forwarder in 1961. See *Common Carriers by Water – Status of Express Cos., Truck Lines & Other Non-Vessel Carriers*, 6 F.M.B. 245, 248-49 (1961). It concluded that such forwarders should be treated as "common carriers" under the Shipping Act if they behaved in essentially the same way as surface freight forwarders who were treated as common carriers under the ICA.[9] The functional and definitional similarities between surface freight forwarders and NVOCCs were observed by courts. See *New York Foreign Freight Forwarders & Brokers Ass'n* v. *ICC*, 589 F.2d 696, 705-06 (D.C. Cir. 1979) (stating "it is difficult to perceive how the role of the NVO[CC]s in this process differs materially from the role of a freight forwarder; each stands as a shipper with respect to the . . . carrier"); 3 Sorkin, *supra* § 14.15. Courts rightly understood the NVOCC, like the surface freight forwarder, to be "a hybrid"; with respect to the cargo owner, the forwarder acts as a carrier, but "[w]ith respect to the vessel and her

[9] The FMB and the ICA's freight forwarder provisions classified forwarders as common carriers if they met three essential criteria: (1) they consolidated small loads into full container loads and shipped the goods with the actual carrier in the forwarder's own name, (2) they assumed the responsibilities of common carrier through the entire voyage of the goods, and (3) they contracted with an underlying carrier to perform some or all of the actual carriage. *Compare* 6 F.M.B. at 256-57 (FMB ruling on ocean forwarders), *and* Practices of Licensed Independent Ocean Freight Forwarders, Ocean Freight Brokers, and Oceangoing Common Carriers, 28 Fed. Reg. 4300, 4300 (May 1, 1963) (defining "non-vessel operating common carrier" or NVOCCs), *with* 49 U.S.C. § 1002(a)(5) (1958) (repealed 1978) (ICA provision defining surface "freight forwarder"). The FMC did treat NVOCCs distinctively in allowing them to file joint rate tariffs, *see* Filing of Tariffs by Common Carriers by Water in the Foreign Commerce of the United States, 35 Fed. Reg. 6394, 6397 (Apr. 21, 1970), but that issue is not relevant here.

owner," it acts as "an agent of the shipper." *Insurance Co. of N. Am.* v. *S/S Am. Argosy*, 732 F.2d 299, 301 (2d Cir. 1984).

In 1984, Congress confirmed the dual role of NVOCCs – common carrier with respect to the actual shipper and shipper with respect to the actual carrier – when it, for the first time in a statute, defined an NVOCC as "a common carrier that does not operate the vessels by which the ocean transportation is provided, *and is a shipper in its relationship with an ocean common carrier*." 46 U.S.C. app. § 1702(17)(B) (emphasis added). Courts have therefore continued to recognize the dual role of NVOCCs, and that the NVOCC acts as "the agent of the cargo owner/shipper when it contracts with the ocean carrier to ship the cargo owner's goods." *Kukje Hwajae Ins.*, 294 F.3d at 1176; see also *SPM Corp.* v. *M/V Ming Moon*, 22 F.3d 523, 527 (3d Cir. 1994); *Ariel Mar. Group*, 1985 W.L. 148948, at *1 (FMC decision recognizing dual character of NVOCCs).

Indeed, as noted above, *Acme Fast Freight* cited the nondiscrimination principle of common carrier regulation as one reason why an actual carrier's obligations to the underlying shipper must be defined by its own bill of lading, even when issued to a forwarder and not to the actual shipper. See 336 U.S. at 480-81. An ocean carrier publishes a tariff, including its bill of lading. See 46 U.S.C. app. § 1707(a)(E); JA 60 (Hamburg Süd bill ¶ 2 providing that "Goods carried hereunder are subject to" applicable FMC tariffs). And, as the FMC has ruled, an ocean carrier generally may not discriminate among shippers (including NVOCCs), draw distinctions based on ownership of the goods, or deviate from the published tariff. See 46 U.S.C. app. § 1709(b); 50 Fed. Reg. 38,896, 38,897 (Sept. 25, 1985); Publishing and Filing Tariffs by Common Carriers in the Foreign Commerce of the United States, 50 Fed. Reg. 14,704, 14,708 & n.5 (Apr. 15, 1985) (citing *Delaware, Lackawanna, & W. R.R.*, 220 U.S. at 252). Under the decision below, an NVOCC like ICC would impermissibly receive preferential terms (greater carrier

liability to the beneficial owner of the goods) than other shippers subject to the same tariff. See *Kansas City S. Ry.* v. *Carl*, 227 U.S. 639, 654 (1913) (liability limitations are part of the filed rate). For all the reasons that the actual carrier's bill of lading controlled in *Acme Fast Freight*, Hamburg Süd's bill of lading is controlling in this case.[10]

Here, there can be no dispute that Kirby had "entrusted" ICC "with goods to be shipped by [the actual carrier]," *Great N. Ry.*, 232 U.S. at 514, and therefore was bound by ICC's contract with Hamburg Süd. This is implicit in every forwarding relationship of this kind: "A shipper which tenders cargo to an NVOCC does so with the clear understanding that the cargo will, in turn, be tendered to a vessel-operating carrier." 50 Fed. Reg. at 14,708; see *Stolt Tank Containers, Inc.* v. *Evergreen Marine Corp.*, 962 F.2d 276, 280 (2d Cir. 1992). Not only was Kirby on notice by the ICC bill that the goods were already shipped aboard the Queensland Star, but

[10] The Eleventh Circuit's rule is also at odds with the fundamental character of common carriage. A shipper (whether the owner, or a freight forwarder or merchant acting with the authority of the owner) who places goods with a carrier grants the carrier a right of "special property" in the goods; the carrier not only takes possession of goods for transit, but it acquires a lien on those goods for its freight and other charges. Dobie, *supra*, § 13, at 27; *id.* § 149, at 473-77, 481-83. It would be absurd to hold that the freight forwarder does not act with the authority of the cargo owner in placing goods with the actual carrier and therefore granting the carrier rights in the property to the potential detriment of the owner. Indeed, the carrier's rights have never been held to vary depending on the nominal party to the contract; a carrier's lien can be enforced to the detriment of a consignee who is not a party to the carrier's bill of lading even when an agreement between the consignee and consignor allocated the obligation to pay freight charges to the consignor. *See Pittsburgh, Cincinnati, Chi. & St. Louis Ry.* v. *Fink*, 250 U.S. 577, 581 (1919); *Hall Corp. of Can.* v. *Cargo Ex Steamer Mont Louis*, 62 F.2d 603, 605 (2d Cir. 1933) (holding that a carrier's lien arising out of the contract between consignor and carrier is effective to bind a cargo owner who was not a party to the contract); 4 Sorkin, *supra* § 26.01, at 26-2 (The carrier's "lien can be discharged and the consignee becomes entitled to the goods only upon tender or payment to the carrier of the legal rate").

that bill specifically authorized ICC to procure transportation of the goods from others. JA 78, JA 86 (¶ 2.1). The fact that ICC was authorized to procure such transportation in its own name, assumed the responsibility of a carrier to Kirby, and issued its own bill of lading to Kirby does not defeat the special agency granted the forwarder in placing the owner's goods with actual carriers. See *Acme Fast Freight*, 336 U.S. at 484-87 & n.27; 14 Am. Jur. 2d *Carriers* § 558 (2000) (authorization to ship goods with a carrier includes incidental authority to accept the carrier's terms).[11]

The Eleventh Circuit's mechanical reasoning that ICC's assumption of carrier duties towards Kirby precluded it from binding Kirby in contracting with carriers to transport Kirby's goods is contrary to an unbroken 150 years of common carrier law. See Bugden, *supra* § 2-01, at 8 ("It is of course quite possible for the freight forwarder to act as agent to his customer and as principal to the third party, or indeed vice versa. In any event it is a fallacy to suppose that a person cannot be a party to a contract in two capacities, both as agent and principal."). This Court should adhere to its longstanding precedent and reverse the decision below.

C. Adoption Of The Rule Below Would Undermine COGSA And Settled, Efficient Trade Practices.

The Eleventh Circuit's rule must be rejected not only because it contravenes the precedent of this Court, but also because it would undermine COGSA and settled and efficient practices in international trade.

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[11] Indeed, despite its position before the Eleventh Circuit, Kirby has sued Hamburg Süd in Australia under the latter's bill of lading, alleging that Kirby was "at all material times the owner of the goods, the holder of the [Hamburg Süd] bill or the person entitled to possession of the goods and to delivery to it of the goods," and that Kirby "is entitled to claim under and in respect of the [Hamburg Süd] Bill, the contract of carriage therein and in respect of loss or damage to the goods." JA 26 (¶¶ 20-21) (emphases omitted).

COGSA "regulates the terms of ocean carriage by the indirect but highly efficacious device of dealing with the terms of the ocean bill of lading," Gilmore & Black, *supra* § 3-25, at 145, and specifically by imposing statutory mandates as "compulsory terms" in the bill, *id.* § 3-38, at 172. The decision below eliminates the basic assumption underlying COGSA: that the bill of lading defines the rights and responsibilities, within the limits of the law, of the ocean carrier. According to the Eleventh Circuit, in the ordinary case of a cargo owner who contracts with a freight forwarder as a common carrier, the ocean carrier's bill of lading issued to the freight forwarder defines *none* of the carrier's rights and duties with regard to the owner, the real party-in-interest. If its bill of lading is unenforceable against the cargo owner, the vessel carrier cannot rely on COGSA's notice of loss or limitations of actions provisions (Section 3(6)), its limitations on liability to losses based solely on unseaworthiness for negligence (Section 4(1)), its substantial additions to the exceptions to the common law rule of absolute liability for carriers (Section 4(2)), and, of course, its default limitation of liability provision (Section 4(5)).[12] Absent the ability to define its rights and duties by contract under COGSA, the carrier is potentially subject to common-law liability as an absolute insurer of the goods.

The Second Circuit has rejected the Eleventh Circuit's rule precisely because it "would defeat COGSA's intended purposes of allocating risk of loss and creating predictable liability rules on which not only carriers but others can rely." *Stolt*, 962 F.2d at 279. "All those involved in a commercial maritime transaction must know who bears the risk of a potential loss so that they can decide who must insure against

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[12] The carrier also would be deprived of the benefit of the nonmandatory terms of the bill of lading, even though such provisions may be critical to its pricing or business decisions. *Cf. Vimar Seguros y Reaseguros*, 515 U.S. at 533-41 (allowing a carrier's bill of lading to select forums and to require arbitration).

it and how much the insurance should cost." M. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 Tex. L. Rev. 1251, 1270 (1989). Yet, under the decision below, the vessel carrier (who will often have no idea whether its shipper is a forwarder or owner, see M. Davies, *In Defense of Unpopular Virtues: Personification and Ratification*, 75 Tul. L. Rev. 337, 396 (2000)), and those providing services under its bill cannot know their liability, or price or insure accordingly.

COGSA, and the longstanding "commercial norm" since *New Jersey Steam* that a cargo owner is bound by contracts of carriage entered into by one authorized to ship its goods, see *Kukje Hwajae*, 294 F.3d at 1176, have fostered an extraordinarily efficient system of trade. Rather than pay the high rates for goods of declared value, the cargo owner purchases transportation from the freight forwarder at the low cost associated with limited liability and undeclared value, and relies instead on cargo insurance (usually on an open policy covering all shipments, *supra* at 9-10) to protect against loss.[13] The freight forwarder can offer low rates because it likewise secures low rates (for its volume and consolidated shipments) from the vessel carrier by accepting that carrier's limitations on liability. For intermodal shipments, the carrier's low rates are further predicated on Paramount and Himalaya clauses that permit the vessel carrier to extend the COGSA limits inland and to third parties used to perform the contract of transportation. Such third party providers in turn offer competitive terms to vessel carriers because they can rely on the Himalaya clause to limit their

[13] *See* Sturley, *Part II*, at 179, 190 ("There is no unfairness in holding [shippers] to the terms on which they made their bargains," for "the true unfairness" is "imposing excess liability on a carrier that set its rates and conducted its business on the assumption that § 4(5) governed the transaction"); *accord Nichimen Co.* v. *M.V. Farland*, 462 F.2d 319, 335 (2d Cir. 1972) (Friendly, J.) ("[T]here is ... no need for shedding crocodile tears on behalf of the shipper or consignee."); *see also Hart* v. *Pennsylvania R.R.*, 112 U.S. 331, 340 (1884) (same).

liability risks. Indeed, Congress specifically authorized such contractual extensions so that shippers and carriers could "place all of their dealings under COGSA, if they so intend," and therefore achieve "a greater degree of certainty and uniformity in their dealings." *Wemhoener Pressen*, 5 F.3d at 741.

The Eleventh Circuit's rule vitiates this efficient system, and instead grants a windfall to cargo owners (and their insurers) who benefit from low rates by not declaring value, yet are not held to the *quid pro quo* of limited liability. Even respondent's counsel has recognized the inequity of the rule that he now defends:

> Litigation to avoid the § 4(5) limitation ... is not intended to bring justice to a poor, defenseless shipper who would otherwise suffer a large, uncompensated loss. The underwriter has already reimbursed the shipper for the loss pursuant to their insurance agreement. This is exactly what they contemplated when the shipper chose to insure the goods rather than to declare their value, and when the underwriter collected its premium to compensate it for bearing the risk that the goods would be lost or damaged. After the loss, the insurer, who collected a premium, seeks to recover from the carrier, who did not collect a premium, and who thought it was entitled to treat the goods as though they were worth only $500 per package.

Sturley, *Part II*, at 180-81 (footnote omitted). The Eleventh Circuit's rule will only promote uncertainty and higher costs of international trade through higher carrier rates or duplicative insurance purchased to cover risks already insured by the cargo insurer. This Court should adhere to settled law, and enforce the Hamburg Süd bill of lading against Kirby.[14]

[14] By contrast, cargo owners (and insurers) are never prejudiced by the established law that the limitation of liability in the actual carrier's bill of lading applies to them, even if that limitation is more severe than the

II. NORFOLK SOUTHERN'S LIABILITY IS LIMITED BY THE HIMALAYA CLAUSE IN THE ICC BILL OF LADING.

This Court should decide this case on the basis of the first question presented, because the fundamental principle of law that underlies modern intermodal transportation is that vessel carriers and their subcontractors rely on the terms of the carrier's bill of lading, see *Acme Freight*, 336 U.S. at 480, and no such provider can rely on the terms of forwarder bills of lading that are unknown to them. But if this Court holds that the Hamburg Süd bill is unenforceable against the cargo owner, Norfolk Southern is clearly protected by the ICC FBL.

The Eleventh Circuit held to the contrary, interpreting this Court's decision in *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959), to nullify certain contractual language, limit the construction of relational terms like "independent contractor" in a Himalaya clause only to those contractors in privity with the bill issuer, and require even greater "linguistic specificity" to cover inland carriers. Pet. App. 12a-17a. The Eleventh Circuit has fundamentally misconceived the rule of *Herd*.

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amount to which the owner agreed to limit the forwarder's liability. They always have recourse against the forwarder to receive exactly the protection against loss for which they bargained. *See Great N. Ry.*, 232 U.S. at 514-15 (stating that "[i]f there was any undervaluation, wrongful classification or violation of [the shipper's] instructions . . . the [shipper] has her remedy against" the forwarder); *Nippon Fire*, 235 F.3d at 62; *The St. Hubert*, 107 F. at 733. The only theoretical risk is forwarder insolvency, but that is more properly borne by the cargo owner who selected the forwarder than by the carrier. In practice, the cargo owner does not bear that risk (because it has cargo insurance), nor does the cargo insurer, because it sets its premiums without regard to recovery from any carrier. *See* M. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5) (Part I)*, 19 J. Mar. L. & Com. 1, 21 n.107 (1988). Furthermore, any conceivable risk is negligible since FIATA members are required to have liability insurance. *FIATA Legal Handbook*, at 143-44.

In *Herd*, a stevedoring company sought protection under a vessel carrier's bill of lading that provided that "'the Carrier's liability, if any, shall be determined on the basis of $500 per package'" under COGSA, and further provided that "'the Carrier and the ship shall be entitled to all of the rights and immunities set forth in said Act.'" 359 U.S. at 299 n.2. This Court began by interpreting the plain language of the bill of lading. It stated that, "[l]ooking to the limitation-of-liability provisions of the bill of lading, we see that they, like § 1304(5) of the Act and its legislative history, do not advert to stevedores or agents." *Id.* at 302. The Court held:

> There is, thus, nothing in those provisions to indicate *that the contracting parties intended to limit the liability of stevedores* or other agents of the carrier for damages caused by their negligence. If such had been a purpose of the contracting parties it must be presumed that they would *in some way have expressed it in the contract.* Since they did not do so, it follows that the provisions of the bill of lading did not cut off respondent's remedy against the agent that did the wrongful act.

Id. (emphasis added and brackets and internal quotation marks omitted).

The *Herd* Court then went on to reject the stevedore's "second contention" that it should adopt the rule that any reference to a carrier includes "all agents of the carrier who perform any part of the work undertaken by the carrier in the contract of carriage." *Id.* at 303. The Court held that such a rule was contrary to precedent and to the principle that:

> contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries, for they "are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, *unless the clarity of the language used expresses such to be the understanding of the contracting parties.*"

Id. at 305 (emphasis added).

Thus, the central precept of *Herd* is that a bill of lading is to be interpreted based on what "the contracting parties intended." *Id.* at 302. In keeping with basic principles of contract interpretation, a court looks to the plain language of the bill to determine the intent of the parties:

> [W]here the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded. This is a maxim of law, and a dictate of common sense; for were a different rule to be admitted, no man, however cautious and intelligent, could safely estimate the extent of his engagements, or rest upon his own understanding of a law, until a judicial construction of those instruments had been obtained.

Green v. *Biddle*, 21 U.S. (8 Wheat.) 1, 89-90 (1823); see *Herd*, 359 U.S. at 302. So, in *Constable* v. *National S.S. Co.*, 154 U.S. 51 (1894), this Court, in exonerating a carrier for responsibility for goods destroyed by fire, refused to "affix . . . a technical meaning" to a liability limitation clause that was contrary to its plain intent. *Id.* at 72; see also *Texas & Pac. Ry.*, 183 U.S. at 629 (clause should have its "fair and reasonable meaning"); *Western Transit Co.* v. *A.C. Leslie & Co.*, 242 U.S. 448, 454 (1917) (rejecting construction of bill of lading that "does violence to the language used and is unreasonable").

The rule of strict construction comes into play only if the limitation clause is ambiguous.[15] Even then, "[t]he principle

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[15] *See Texas & Pac. Ry.*, 183 U.S. at 626; *Mitsui & Co.* v. *American Export Lines, Inc.*, 636 F.2d 807, 822-23 (2d Cir. 1981). Even the dissenting justices in *Constable* who would have held the carrier liable acknowledged the "well-settled rule" that stipulations against liability are to be strictly construed against the carrier only "[i]n so far as they are ambiguous or leave the intentions of the parties in doubt." 154 U.S. at 81 (Jackson, J., dissenting).

of strict construction . . . does not mean that [words] must be given their narrowest possible meaning" and denied their "natural significance," *Singer* v. *United States*, 323 U.S. 338, 341-42 (1945), but only that the meaning of text "shall not be enlarged by inferences or implications not plainly to be drawn from the language," *District of Columbia* v. *Johnson*, 165 U.S. 330, 338 (1897); see *Herd*, 359 U.S. at 305; *Carib Prince*, 170 U.S. 655, 659 (1898).

The meaning of the Himalaya clause of the ICC FBL could hardly be more plain. It extends the bill's liability limitations not only to the carrier's servants and agents, but to "*any* . . . other person (including *any* independent contractor) whose services have been used in order to perform the contract." JA 94 (¶ 10.1) (emphasis added). The "multimodal transport contract" here is for "performance of the entire transport, from the place at which the goods are taken in charge (place of receipt evidenced in this FBL) to the place of delivery designated in this FBL": *i.e.*, from Sydney, Australia to Huntsville, Alabama. JA 86 (¶ 2.1(a)); JA 78. Norfolk Southern is indisputably "a person . . . whose services have been used in order to perform the contract": it carried the goods from Savannah, Georgia to Huntsville, Alabama. Given that the Himalaya clause comprehensively covers "any" person performing such services, it necessarily covers Norfolk Southern. See *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"). To remove all doubt about its comprehensiveness, the clause clarifies that the term "any . . . other person" "includ[es] *any* independent contractor"; no independent contractor is excluded. See, *e.g.*, *Wemhoener Pressen*, 5 F.3d at 743 (finding subcontractor covered by Himalaya clause reaching "'any person whomsoever by whom the Carriage or any portion of the Carriage is performed or undertaken'") (emphasis omitted).

The plain meaning of the Himalaya clause is confirmed by other provisions of the bill. See *Androscoggin Mills*, 89 U.S. (22 Wall.) at 601; *Crossman* v. *Burrill*, 179 U.S. 100, 107 (1900). Critically, the same language defines the liability of the freight forwarder who issued the bill, and against whom its customer has primary recourse. The freight forwarder "assumes liability as set out in these conditions," and subject thereto "shall be responsible for the acts and omissions of his servants or agents acting within the scope of their employment, or *any other person of whose services he makes use for the performance of the contract evidenced by this FBL*, as if such acts and omissions were his own" in any "period from the time the Freight Forwarder has taken the goods in his charge to the time of their delivery." JA 86, JA 89 (¶¶ 2.1, 2.2, 6.1) (emphasis added).

If the Eleventh Circuit's crabbed construction of this language were adopted, then the freight forwarder would have an extraordinarily truncated liability. It would only have liability for goods if damaged by the independent contractor with whom it is in privity (Hamburg Süd), but not if damaged by any ocean carrier if Hamburg Süd had subcontracted the actual carriage, nor by any stevedore or other independent contractor of Hamburg Süd at either port, nor by any inland carrier whatsoever. This construction does violence to the plain language of the bill, which is clearly meant to create "back-to-back liability" of the freight forwarder and every person used to perform the contract of transportation from Sydney to Huntsville, including all actual carriers by land or sea. *FIATA Legal Handbook*, at 59-61, and to ensure "that the freight forwarder cannot avoid a liability for such other persons by referring to his status as an intermediary." Ramberg, *supra*, at 51. Indeed, respondents should not be heard to claim otherwise, for they have filed suit against ICC in Australia to hold it liable under its bill for Norfolk Southern's alleged default. JA 19-29. The language used in the liability clauses of the ICC bill must be given their plain

meaning. But even if that language were ambiguous, which it is not, the rule of strict construction cuts against the Eleventh Circuit's interpretation. Limitation clauses are construed against the carrier that issued the bill, see *Carib Prince*, 170 U.S. at 659, and this language cannot be read to limit severely ICC's liability to Kirby.

By disregarding the plain language of the bill, the Eleventh Circuit's decision does violence to *Herd*, and certainly is not faithful to it. Rather than determine which third persons "the contracting parties intended" to be covered, 359 U.S. at 302, the Eleventh Circuit has declared fixed rules of law to nullify the actual language used in the parties' contract. First, the court held that as a matter of law the term "'any . . . other person . . . whose services have been used in order to perform the contract'" failed its "clarity of language requirement." Pet. App. 12a (omission in original). The court accordingly shunted the parties' language aside, and remarkably rewrote the contract: "This leaves, then, a Himalaya clause that extends to 'any servant, agent, or . . . any independent contractors.'" *Id.* (omission in original). Contract construction, even the strict kind, does not entitle a court to strike the contract's language. See *Androscoggin Mills*, 89 U.S. (22 Wall.) at 601.

The Eleventh Circuit then turned its knife to the phrase "any independent contractor." It silently excised the word "any," and proceeded to announce its second rule of Himalaya clause law to limit the reach of contract language with a relational term like "independent contractor": "In this Circuit, . . . the law requires privity between the carrier and the party seeking shelter in the Himalaya clause." Pet. App. 13a-14a & n.10. The Eleventh Circuit claimed the parties "could have said so" if they wanted to cover independent contractors not in privity, ignoring that the categorical phrase "*any* independent contractor" does just that. The Eleventh Circuit's disregard of the language of the contract is breathtaking. The contract extends liability protection to a

broad class of which independent contractors are a subset: any persons used to perform the contract "including any independent contractor." JA 94 (¶ 10.1). Invoking idiosyncratic rules, the Eleventh Circuit denied liability protection not only to the *class* of persons the parties identified, but even to a specified *subset* of that class; it instead restricted Himalaya clause coverage to a *subset of the subset* of the class that the parties chose. Neither *Herd* nor common sense sanctions this result.

The Eleventh Circuit's "privity" requirement cannot be squared with the intent of the parties for another reason; it ignores the context of modern intermodal transportation. "Many non-vessel-operating carriers, or NVOCs, contract with the shipper to carry the cargo but then subcontract every aspect of the transportation," and "virtually every" ocean carrier (with whom the NVOC subcontracts) "subcontracts with separate companies to perform specialized aspects of the carriage"; indeed, there would be no other way to handle "the explosion of door-to-door shipments." Sturley, *Interim View*, at 79-80 (footnote omitted). For the reasons given above, the freight forwarder would not want to limit the Himalaya clause to only its direct subcontractor (the ocean carrier). The shipper (who has declined to declare value, accepted the carrier's liability limitations, and insured its goods for the entire transit) is indifferent not only to who performs the actual tasks of transport, but also to their contractual relation to the freight forwarder. See Mahoney, *supra*, at 3 ("shippers consider the word 'intermodal' to mean uniform conditions of carriage, and limits of liability, throughout the entire movement"). Indeed, respondents' counsel has rightly characterized "privity of contract" as an "irrelevant issue[]" in limiting the liability of intermodal providers. M. Sturley, *The Proposed Amendments to the Carriage of Goods by Sea Act: An Update*, 13 U.S.F. Mar. L.J. 1, 12 (2001). It makes no

sense to devise a rule imputing to contracting parties an intent to make privity the touchstone of Himalaya clause coverage.[16]

The Eleventh Circuit's invocation of *Herd* to deny Himalaya clause protection to inland carriers is likewise unsound. First, if question 1 is resolved against petitioner and (contrary to *Acme Fast Freight*, 336 U.S. at 478-80 & n.17) ICC is deemed an "initial carrier" rather than a shipper in its dealings with Hamburg Süd, then it is passing strange to presume an intent to exclude a "connecting carrier" like Norfolk Southern, since a connecting carrier under a through bill of lading is always entitled to the liability protections of the initial carrier. See *Mexican Light & Power Co.*, 331 U.S. at 734. Norfolk Southern would have the same liability as ICC even in the absence of a Himalaya clause.

Second, under *Herd*, a Himalaya clause does not lack clarity if it does not enumerate "inland carriers" as one of its

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[16] The error of the Eleventh Circuit's privity rule is also underscored by the *legal* context of Himalaya clauses: namely, such clauses were drafted for the very purpose of overcoming antiquated privity rules. Modern clauses respond not only to *Herd*, but also to a British decision, *Scruttons Ltd.* v. *Midland Silicones Ltd.*, [1962] A.C. 446 (1961), which invoked the strict doctrine of privity then prevailing in English law to deny third-party beneficiary status to stevedores. *See* Robertson, *supra*, at 369. Carriers began including clauses like ¶ 10.2 of the FBL, which states that "[i]n entering into this contract . . . , the Freight Forwarder, to the extent of these provisions, does not only act on his own behalf, but also as agent or trustee for such persons, and such persons shall to this extent be or be deemed to be parties to this contract," JA 94 (ICC bill ¶ 10.2), as a device to satisfy privity requirements, *see* Ramberg, *supra*, at 67; *see also New Zealand Shipping Co.* v. *A.M. Satterthwaite & Co.*, 1 Lloyd's Rep. 534, 539 (P.C. 1974) (appeal taken from N.Z.) ("*The Eurymedon*") (permitting stevedore to assert time bar defense as set forth in carrier's bill of lading). The Eleventh Circuit's privity rule, moreover, is especially perverse when applied to a freight forwarder's bill of lading because (as noted above) the only covered entity would be the initial ocean carrier with whom the forwarder is in privity. The net result is that all the third-party providers (including stevedores) for whose benefit these legal devices were invented are excluded from the protection of the Himalaya clause in the FBL.

beneficiaries. Categorical language, like that actually used in clause 10.1, is no less clear in its coverage than a laundry list, which creates definitional problems regarding specific terms, and ambiguity under the *expressio unius* principle if a service provider is omitted. In any event, *Herd* certainly does not command "linguistic specificity." Pet. App. 16a; this Court required only that "contracting parties . . . *in some way* have expressed [an intent to limit the third party's liability] in the contract." 359 U.S. at 302 (emphasis added).

Third, the cases relied upon by the Eleventh Circuit that denied coverage to inland carriers did so in the context of bills of lading for *ocean* transport. Pet. App. 15a-16a; it makes no sense to exclude one mode of carrier from a clause in a bill of lading that is by its terms a "*multimodal* transport contract" with an *inland* destination. JA 85 (definition of "freight forwarder") (emphasis added); *Report to Congress* at 29 ("the U.S. marine transportation system extends beyond the waterfront, using trucks, railroads, and pipelines to receive and ship products"). The Eleventh Circuit nonetheless justified that result because the Himalaya clause extended COGSA to its beneficiaries for this transaction. Pet. App. 5a.[17] and the Eleventh Circuit felt the need to "be

[17] Petitioner and respondents certified the case to the Eleventh Circuit on the basis that Norfolk Southern's liability under both the Hamburg Sud and ICC bills, if they applied, was the COGSA limit of $500 per package, or $5,000. C.A. Pet. for Permission To Appeal Interlocutory Order at 4. Respondents did not dispute this in their brief in opposition, but in their later supplemental brief they raised for the first time a suggestion that Norfolk Southern's liability limit under the ICC bill would be $450,000. Resp. Supp. Br. 9. That issue is unnecessary to the question presented of whether the Himalaya Clause applies to Norfolk Southern (at whatever limit), and is presented too late. Sup. Ct. R. 15.2. It is also a misconstruction of the phrase "COGSA, where applicable" in ¶ 8.6(a) of the FBL, which covers the circumstance where the actual ocean carrier extends COGSA by contract to inland transportation. JA 92-93; *see* 1 Sorkin, *supra* § 2.01[3], at 2-15 ("When [COGSA] does not apply of its own force (ex proprio vigore), it may nevertheless be applicable as a contract."). In any event, respondents should not be able to dispute the applicability of the COGSA limit, when that was the basis on which they secured a favorable ruling from the Eleventh Circuit. Finally, to the extent respondents may claim a limitation of liability in the ICC bill that is much higher than the Hamburg Süd limitation, that merely underscores the need for this Court to resolve this case on the basis of the first question presented.

cautious about extending the reach of a Himalaya clause, and with it the reach of COGSA, inland," *id.* at 16a. This bespeaks confusion. The FBL is a standard-form document to cover transportation anywhere in the world. It provides a default liability rule; another special rule of network liability where "during one particular stage of multimodal transport" there is "an applicable international convention or mandatory national law would have provided another limit of liability"; and another rule where COGSA applies. JA 91-93 (¶¶ 8.3-8.6). The Himalaya clause cannot be read to distinguish between inland and marine stages of transport, or to create a special exception for inland carriers when the COGSA limit happens to apply. It provides without qualification that "[t]hese [liability] conditions apply *whenever claims relating to the performance of the contract* evidenced by this FBL are made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract." JA 91-93 (¶ 10.1) (emphasis added). And inland carriers cannot be excluded from this clause (¶ 10.1) unless the freight forwarder is exonerated from liability for their acts under clause 2.2, JA 86, a construction this bill cannot bear.

Herd does not authorize courts to engage in reformation of contracts in keeping with their own wooden rules of risk allocation. The Eleventh Circuit's construction of the Himalaya clause, like its rule on the enforceability of ocean carrier bills of lading, contravenes this Court's precedent and unfairly gives cargo owners and insurers windfalls that were not part of their bargains.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted.

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Standard Conditions (1992) governing the FIATA MULTIMODAL TRANSPORT BILL OF LADING

Definitions

- «Freight Forwarder» means the Multimodal Transport Operator who issues this FBL and is named on the face of it and assumes liability for the performance of the multimodal transport contract as a carrier.
- «Merchant» means and includes the Shipper, the Consignor, the Consignee, the Holder of this FBL, the Receiver and the Owner of the Goods.
- «Consignor» means the person who concludes the multimodal transport contract with the Freight Forwarder.
- «Consignee» means the person entitled to receive the goods from the Freight Forwarder.
- «Taken in charge» means that the goods have been handed over to and accepted for carriage by the Freight Forwarder at the place of receipt evidenced in this FBL.
- «Goods» means any property including live animals as well as containers, pallets or similar articles of transport or packaging not supplied by the Freight Forwarder, irrespective of whether such property is to be or is carried on or under deck.

1. Applicability

Notwithstanding the heading «FIATA Multimodal Transport Bill of Lading (FBL)» these conditions shall also apply if only one mode of transport is used.

2. Issuance of this FBL

2.1. By issuance of this FBL the Freight Forwarder

a) undertakes to perform and/or in his own name to procure the performance of the entire transport, from the place at which the goods are taken in charge (place of receipt evidenced in this FBL) to the place of delivery designated in this FBL,

b) assumes liability as set out in these conditions.

2.2. Subject to the conditions of this FBL the Freight Forwarder shall be responsible for the acts and omissions of his servants or agents acting within the scope of their employment, or any other person of whose services he makes use for the performance of the contract evidenced by this FBL, as if such acts and omissions were his own.

3. Negotiability and title to the goods

3.1. This FBL is issued in a negotiable form unless it is marked «non negotiable». It shall constitute title to the goods and the holder, by endorsement of this FBL, shall be entitled to receive or to transfer the goods herein mentioned.

3.2. The information in this FBL shall be prima facie evidence of the taking in charge by the Freight Forwarder of the goods as described by such information unless a contrary indication, such as «shipper's weight, load and count», «shipper-packed container» or similar expressions, has been made in the printed text or superimposed on this FBL. However, proof to the contrary shall not be admissible when the FBL has been transferred to the consignee for valuable consideration who in good faith has relied and acted thereon.

4. Dangerous Goods and Indemnity

4.1. The Merchant shall comply with rules which are mandatory according to the national law or by reason of international Convention, relating to the carriage of goods of a dangerous nature, and shall in any case inform the Freight Forwarder in writing of the exact nature of the danger, before goods of a dangerous nature are taken in charge by the Freight Forwarder and indicate to him, if need be, the precautions to be taken.

4.2. If the Merchant fails to provide such information and the Freight Forwarder is unaware of the dangerous nature of the goods and the necessary precautions to be taken and if, at any time, they are deemed to be a hazard to life or property, they may at any place be unloaded, destroyed or rendered harmless, as circumstances may require, without compensation. The Merchant shall indemnify the Freight Forwarder against all loss, damage, liability or expense arising out of their being taken in charge, or the carriage, or of any service incidental thereto.
The burden of proving that the Freight Forwarder knew the exact nature of the danger constituted by the carriage of the said goods shall rest on the Merchant.

4.3. If any goods shall become a danger to life or property, they may in like manner be unloaded or landed at any place or destroyed or rendered harmless. If such danger was not caused by the fault and neglect of the Freight Forwarder he shall have no liability and the Merchant shall indemnify him against all loss, damage, liability and expense arising therefrom.

5. Description of Goods and Merchant's Packing and Inspection

5.1. The Consignor shall be deemed to have guaranteed to the Freight Forwarder the accuracy, at the time the goods were taken in charge by the Freight Forwarder, of all particulars relating to the general nature of the goods, their marks, number, weight, volume and quantity and, if applicable, to the dangerous character of the goods, as furnished by him or on his behalf for insertion on the FBL.
The Consignor shall indemnify the Freight Forwarder against all loss, damage and expense resulting from any inaccuracy or inadequacy of such particulars.
The Consignor shall remain liable even if the FBL has been transferred by him.
The right of the Freight Forwarder to such an indemnity shall in no way limit his liability under this FBL to any person other than the Consignor.

5.2. The Freight Forwarder shall not be liable for any loss, damage or expense caused by defective or insufficient packing of goods or by inadequate loading or packing within containers or other transport units when such loading or packing has been performed by the Merchant or on his behalf by a person other than the Freight Forwarder, or by the defect or unsuitability of the containers or other transport units supplied by the Merchant, or if supplied by the Freight Forwarder if a defect or unsuitability of the container or other transport unit would have been apparent upon reasonable inspection by the Merchant.
The Merchant shall indemnify the Freight Forwarder against all loss, damage, liability and expense so caused.

6. Freight Forwarder's Liability

6.1. The responsibility of the Freight Forwarder for the goods under these conditions covers the period from the time the Freight Forwarder has taken the goods in his charge to the time of their delivery.

6.2. The Freight Forwarder shall be liable for loss of or damage to the goods as well as for delay in delivery if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in Clause 2.1.a, unless the Freight Forwarder proves that no fault or neglect of his own, his servants or agents or any other person referred to in Clause 2.2. has caused or contributed to such loss, damage or delay. However, the Freight Forwarder shall only be liable for loss following from delay in delivery if the Consignor has made a declaration of interest in timely delivery which has been accepted by the Freight Forwarder and stated in this FBL.

6.3. Arrival times are not guaranteed by the Freight Forwarder. However, delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon or, in the absence of such agreement, within the time which would be reasonable to require of a diligent Freight Forwarder, having regard to the circumstances of the case.

6.4. If the goods have not been delivered within ninety consecutive days following soon date of delivery determined in Clause 6.3. the claimant may, in the absence of evidence to the contrary, treat the goods as lost.

6.5. When the Freight Forwarder establishes that, in the circumstances of the case, the loss or damage could be attributed to one or more causes or events, specified in a - e of the present clause, it shall be presumed that it was so caused, always provided, however, that the claimant shall be entitled to prove that the loss or damage was not, in fact, caused wholly or partly by one or more of such causes or events:

a) an act or omission of the Merchant, or person other than the Freight Forwarder acting on behalf of the Merchant or from whom the Freight Forwarder took the goods in charge,

b) insufficiency or defective condition of the packaging or marks and/or numbers,

c) handling, loading, stowage or unloading of the goods by the Merchant or any person acting on behalf of the Merchant,

d) inherent vice of the goods,

e) strike, lockout, stoppage or restraint of labour.

6.6. **Defences for carriage by sea or inland waterways**

Notwithstanding Clauses 6.2., 6.3. and 6.4. the Freight Forwarder shall not be liable for loss, damage or delay in delivery with respect to goods carried by sea or inland waterways when such loss, damage or delay during such carriage has been caused by:

a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship,

b) fire, unless caused by the actual fault or privity of the carrier, however, always provided that whenever loss or damage has resulted from unseaworthiness of the ship, the Freight Forwarder can prove that due diligence has been exercised to make the ship seaworthy at the commencement of the voyage.

7. Paramount Clauses

7.1. These conditions shall only take effect to the extent that they are not contrary to the mandatory provisions of International Conventions or national law applicable to the contract evidenced by this FBL.

7.2. The Hague Rules contained in the International Convention for the unification of certain rules relating to Bills of Lading, dated Brussels 25th August 1924, or in those countries where there are already in force the Hague-Visby Rules contained in the Protocol of Brussels, dated 23rd February 1968, as enacted in the Country of Shipment, shall apply to all carriage of goods by sea and also to the carriage of goods by inland waterways, and such provisions shall apply to all goods whether carried on deck or under deck.

7.3. The Carriage of Goods by Sea Act of the United States of America (COGSA) shall apply to the carriage of goods by sea, whether on deck or under deck, if compulsorily applicable to this FBL or would be applicable but for the goods being carried on deck in accordance with a statement on this FBL.

8. Limitation of Freight Forwarder's Liability

8.1. Assessment of compensation for loss of or damage to the goods shall be made by reference to the value of such goods at the place and time they are delivered to the consignee or at the place and time when, in accordance with this FBL, they should have been so delivered.

8.2. The value of the goods shall be determined according to the current commodity exchange price or, if there is no such price, according to the current market price or if there are no such prices, by reference to the normal value of goods of the same name and quality.

8.3. Subject to the provisions of subclauses 8.4. to 8.9. inclusive, the Freight Forwarder shall in no event be or become liable for any loss of or damage to the goods in an amount exceeding the equivalent of 666.67 SDR per package or unit or 2 SDR per kilogramme of gross weight of the goods lost or damaged, whichever is the higher, unless the nature and value of the goods shall have been declared by the Consignor and accepted by the Freight Forwarder before the goods have been taken in his charge, or the ad valorem freight rate paid, and such value is stated in the FBL by him, then such declared value shall be the limit.

8.4. Where a container, pallet or similar article of transport is loaded with more than one package or unit, the packages or other shipping units enumerated in the FBL as packed in such article of transport are deemed packages or shipping units. Except as aforesaid, such article of transport shall be considered the package or unit.

8.5. Notwithstanding the above mentioned provisions, if the multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the Freight Forwarder shall be limited to an amount not exceeding 8.33 SDR per kilogramme of gross weight of the goods lost or damaged.

8.6. a) When the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law would have provided another limit of liability if a separate contract of carriage had been made for that particular stage of transport, then the limit of the Freight Forwarder's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law.

b) Unless the nature and value of the goods shall have been declared by the Merchant and inserted in this FBL, and the ad valorem freight rate paid, the liability of the Freight Forwarder under COGSA, where applicable, shall not exceed US$ 500 per package or, in the case of goods not shipped in packages, per customary freight unit.

8.7. If the Freight Forwarder is liable in respect of loss following from delay in delivery, or consequential loss or damage other than loss of or damage to the goods, the liability of the Freight Forwarder shall be limited to an amount not exceeding the equivalent of twice the freight under the multimodal contract for the multimodal transport under this FBL.

8.8. The aggregate liability of Freight Forwarder shall not exceed the limits of liability for total loss of the goods.

8.9. The Freight Forwarder is not entitled to the benefit of the limitation of liability if it is proved that the loss, damage or delay in delivery resulted from a personal act or omission of the Freight Forwarder done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

9. Applicability to Actions in Tort

These conditions apply to all claims against the Freight Forwarder relating to the performance of the contract evidenced by this FBL, whether the claim be founded in contract or in tort.

10. Liability of Servants and other Persons

10.1. These conditions apply whenever claims relating to the performance of the contract evidenced by this FBL are made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract, whether such claims are founded in contract or in tort, and the aggregate liability of the Freight Forwarder and of such servants, agents or other persons shall not exceed the limits in clause 8.

10.2. In entering into this contract as evidenced by this FBL, the Freight Forwarder, to the extent of these provisions, does not only act on his own behalf, but also as agent or trustee for such persons, and such persons shall to this extent be or be deemed to be parties to this contract.

10.3. However, if it is proved that the loss of or such loss or damage to the goods resulted from a personal actor omission of such a person referred to in Clause 10.1., done with intent to cause damage, or recklessly and with knowledge that damage would probably result, such person shall not be entitled to benefit of limitation of liability provided for in Clause 8.

10.4. The aggregate of the amounts recoverable from the Freight Forwarder and the persons referred to in Clauses 2.2. and 10.1. shall not exceed the limits provided for in these conditions.

11. Method and Route of Transportation

Without notice to the Merchant the Freight Forwarder has the liberty to carry the goods on or under deck and to choose or substitute the means, route and procedure to be followed in the handling, stowage, storage and transportation of the goods.

12. Delivery

12.1. Goods shall be deemed to be delivered when they have been handed over or placed at the disposal of the Consignee or his agent in accordance with this FBL, or when the goods have been handed over to any authority or other party to whom, pursuant to the law or regulation applicable at the place of delivery, the goods must be handed over, or such other place at which the Freight Forwarder is entitled to call upon the Merchant to take delivery.

12.2. The Freight Forwarder shall also be entitled to store the goods at the sole risk of the Merchant, and the Freight Forwarder's liability shall cease, and the cost of such storage shall be paid, upon demand, by the Merchant to the Freight Forwarder.

12.3. If at any time the carriage under this FBL is or is likely to be affected by any hindrance or risk of any kind (including the condition of the goods) not arising from any fault or neglect of the Freight Forwarder or a person referred to in Clause 2.2. and which cannot be avoided by the exercise of reasonable endeavours the Freight Forwarder may:

abandon the carriage of the goods under this FBL and, where reasonably possible, place the goods or any part of them at the Merchant's disposal at any place which the Freight Forwarder may deem safe and convenient, whereupon delivery shall be deemed to have been made, and the responsibility of the Freight Forwarder in respect of such goods shall cease.

In any event, the Freight Forwarder shall be entitled to full freight under this FBL and the Merchant shall pay any additional costs resulting from the above mentioned circumstances.

13. Freight and Charges

13.1. Freight shall be paid in cash, without any reduction or deferment on account of any claim, counterclaim or set-off, whether prepaid or payable at destination.
Freight shall be considered as earned by the Freight Forwarder at the moment when the goods have been taken in his charge, and not to be returned in any event.

13.2. Freight and all other amounts mentioned in this FBL are to be paid in the currency named in this FBL or, at the Freight Forwarder's option, in the currency of the country of dispatch or destination at the highest rate of exchange for bankers sight bills current for prepaid freight on the day of dispatch and for freight payable at destination on the day when the Merchant is notified on arrival of the goods there or on the date of withdrawal of the delivery order, whichever rate is the higher, as at the option of the Freight Forwarder on the date of this FBL.

13.3. All dues, taxes and charges or other expenses in connection with the goods shall be paid by the Merchant.
Where equipment is supplied by the Freight Forwarder, the Merchant shall pay all demurrage and charges which are not due to a fault or neglect of the Freight Forwarder.

13.4. The Merchant shall reimburse the Freight Forwarder in proportion to the amount of freight for any costs for deviation or delay or any other increase of costs of whatever nature caused by war, warlike operations, epidemics, strikes, government directions or force majeure.

13.5. The Merchant warrants the correctness of the declaration of contents, insurance, weight, measurements or value of the goods but the Freight Forwarder has the liberty to have the contents inspected and the weight, measurements or value verified. If on such inspection it is found that the declaration is not correct it is agreed that a sum equal either to five times the difference between the correct figure and the freight charged, or to double the correct freight less the freight charged, whichever sum is the smaller, shall be payable as liquidated damages to the Freight Forwarder for his inspection costs and losses of freight on other goods notwithstanding any other sum having been stated on this FBL as freight payable.

13.6. Despite the acceptance by the Freight Forwarder of instructions to collect freight, charges or other expenses from any other person in respect of the transport under this FBL, the Merchant shall remain responsible for such monies on receipt of evidence of demand and the absence of payment for whatever reason.

14. Lien

The Freight Forwarder shall have a lien on the goods and any documents relating thereto for any amount due at any time to the Freight Forwarder from the Merchant including storage fees and the cost of recovering same, and may enforce such lien in any reasonable manner which he may think fit.

15. General Average

The Merchant shall indemnify the Freight Forwarder in respect of any claims of a General Average nature which may be made on him and shall provide such security as may be required by the Freight Forwarder in this connection.

16. Notice

16.1. Unless notice of loss of or damage to the goods, specifying the general nature of such loss or damage, is given in writing by the consignee to the Freight Forwarder when the goods are delivered to the consignee in accordance with clause 12, such handing over is prima facie evidence of the delivery by the Freight Forwarder of the goods as described in this FBL.

16.2. Where the loss or damage is not apparent, the same prima facie effect shall apply if notice in writing is not given within 6 consecutive days after the day when the goods were delivered to the consignee in accordance with clause 12.

17. Time bar

The Freight Forwarder shall, unless otherwise expressly agreed, be discharged of all liability under these conditions unless suit is brought within 9 months after the delivery of the goods, or the date when the goods should have been delivered, or the date when in accordance with clause 6.4. failure to deliver the goods would give the consignee the right to treat the goods as lost.

18. Partial Invalidity

If any clause or a part thereof is held to be invalid, the validity of this FBL and the remaining clauses or a part thereof shall not be affected.

19. Jurisdiction and applicable law

Actions against the Freight Forwarder may be instituted only in the place where the Freight Forwarder has his place of business as stated on the reverse of this FBL and shall be decided according to the law of the country in which that place of business is situated.

The ICC logo denotes that this document has been deemed by the ICC to be in conformity with the UNCTAD/ICC Rules for Multimodal Transport Documents. The ICC logo does not imply ICC endorsement of the document nor does it in any way make the ICC party to any possible legal action resulting from the use of this document.

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No. 02-1028

IN THE
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY PTY LIMITED D/B/A KIRBY ENGINEERING AND ALLIANZ AUSTRALIA LIMITED
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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May 28, 2004

QUESTIONS PRESENTED

1. Does a bill of lading contract that a transportation company concludes with a manufacturer as a "carrier," thereby agreeing to assume responsibility for the carriage of the manufacturer's goods, rather than as an "agent," authorize that carrier to bind the cargo owner to a subcontract of carriage with another carrier?

2. Does a Himalaya clause in a bill of lading using general language mentioning servants, agents, and independent contractors adequately specify a sub-sub-subcontractor with "sufficient clarity," as required by *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959)?

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents James N. Kirby Pty Limited d/b/a Kirby Engineering and Allianz Australia Insurance Limited state the following:

James N. Kirby Pty Limited d/b/a Kirby Engineering, an Australian corporation, has no parent company, and no publicly owned company owns 10% or more of its stock.

Allianz Australia Insurance Limited, which was known as MMI General Insurance, Ltd. when this litigation began, is a wholly owned subsidiary of Allianz AG, Munich, a German public stock corporation. Allianz AG has no parent company, and the only publicly owned company that owns 10% or more of its stock is Münchener Rückversicherungs-Gesellschaft AG.

For the convenience of the Court when referring to the parties in the case, we will continue to refer to co-respondent Allianz Australia Insurance Limited as "MMI General Insurance, Ltd." (or "MMI"), which was the name in use at the time of the relevant transactions.

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Throughout the world, commercial parties rely on freedom of contract to define their obligations and to limit their liabilities to each other. This case involves the interpretation of two bills of lading issued in Australia to evidence two contracts for the carriage of goods. Under normal principles of contract interpretation, one contract (the Hamburg Süd bill of lading) cannot limit respondent Kirby's rights to recover in tort for the negligence of petitioner Norfolk Southern ("NS"): Kirby is not a party to that contract, and International Cargo Control Pty Ltd. ("ICC"), the party with whom Hamburg Süd contracted, was not Kirby's agent for any purpose. The other contract (ICC's bill of lading) *is* binding on Kirby, but the Himalaya clause in that bill does not benefit NS: the contract language lacks the requisite clarity and specificity to extend to sub-sub-subcontractors or inland carriers. The Eleventh Circuit meticulously analyzed those contracts to reject NS's effort to limit its liability to $5,000 from a train derailment with a loss of approximately $1.5 million.

Advancing an argument it never made below (or in any other court before now, for that matter), NS crafts an elaborate federal common law rule that it asserts should trump the rights of commercial parties to contract. At many different levels, NS's concoction is so obviously a post-hoc invention of its lawyers that it bears no relation to the real world. Under its own Rail Circular, NS agreed to carry the cargo without knowing its value in exchange for a limit on liability *in excess of* the damage it caused. It seeks to escape its own commercial expectations and carriage responsibilities by implausibly asserting that it is the beneficiary of an old federal common law rule supposedly affording primacy to the ocean bill of lading of the "actual carrier," which it represents was Hamburg Süd. But even if there were such a rule – and NS has made no such showing – Hamburg Süd in fact did not "actually" carry anything but the paperwork: like ICC, it contracted as "carrier" and performed its contract by procuring space aboard a vessel (the *Queensland Star*) owned and operated by a company with which Hamburg Süd had a slot chartering arrangement. NS's argument is based on a carefully crafted, but fatally flawed, series of assumptions that are

simply false. If accepted, NS's argument would completely upset commercial expectations around the world and chart the United States on a solitary course apart from that of every other major maritime nation.

STATEMENT

1. In this interlocutory appeal of a summary judgment entered for NS in which discovery was limited to the cause of the derailment, this Court is obliged to accept the facts alleged in the complaint as true and to draw all necessary inferences in respondents' favor. Because NS has shifted the focus of the questions presented from those granted certiorari,[1] it is important to clarify certain factual matters NS has erroneously represented. Respondents do so based on public record materials, discovery materials produced by NS, and correspondence that would be available in discovery.

In the spring of 1997, James N. Kirby Pty Ltd ("Kirby") solicited bids from four Australian transportation companies to carry engineering equipment to General Motors' Delphi Saginaw plant in Athens, Alabama. Some of this equipment could be shipped in normal containers, but the 10 container loads at issue in this case involved overdimensional loads – equipment that exceeded the height of the containers and therefore needed to be carried in "open top" containers. *See* JA 105. In June 1997, two months before this shipment, Kirby finalized its contract of carriage with ICC, which included ICC's taking responsibility to truck the goods from

[1] In its merits brief, NS changed the wording of both questions in material respects. The reformulated Question 1 stresses the carriers that "actually transport" the goods, whereas petition Question 1 did not. *Compare* NS Br. i ("carriers that actually transport the owner's goods") *with* Pet. i ("carriers to provide that transportation"). We address the significance of that change at page 15, *infra*. NS has completely reformulated Question 2, dropping the reference to "federal maritime law" controlling the disposition so that the reformulated question is strictly a question of contract interpretation, and obscuring a critical omission (*see* Opp. 24) in petition Question 2, which ignored the alternative holding of the Eleventh Circuit on this issue that constitutes an independent basis for affirming the judgment. *See infra* at 42.

Kirby's plant to the port in Sydney and from the Huntsville rail ramp to the Delphi Saginaw plant in Athens.

On August 27, 1997, ICC issued a bill of lading that evidenced its contract with Kirby to carry the 10 containers from Sydney to Huntsville. A Himalaya clause (*see* Pet. App. 2a & n.1) purported to extend the issuer's defenses to "any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract." *Id.* at 67a. ICC subcontracted with Hamburg Süd for carriage of the goods from Sydney to the Huntsville rail ramp. *See* JA 32. Hamburg Süd, in turn, "arranged for the waterliner service through its subsidiary, Columbus Line USA, Inc., which then subcontracted with [NS] for the inland carriage of the goods from the terminal at Savannah, Georgia to the Huntsville ramp." *Id.*

Hamburg Süd contracted for Kirby's cargo to be carried aboard the *Queensland Star*, a vessel that was owned and operated continuously by Blue Star (North America) Ltd. from 1991 until its demolition in 2003. *See* www.bluestarline.org/act/act6.html; Lloyd's Register of Ships, 1997-98, at 307 (1997).[2] Pursuant to an arrangement between Blue Star and Hamburg Süd, Hamburg Süd obtained space for Kirby's cargo aboard the *Queensland Star*, apparently under a "slot charter," whereby one carrier charters container slots on another's vessels. The agreements authorizing such transactions are on file with the Federal Maritime Commission

[2] The court below assumed that Hamburg Süd owned the *Queensland Star*. *See* Pet. App. 4a. Respondents have consistently maintained (as they do here) that ownership of the vessel that carries the goods is (and always has been) legally irrelevant in determining the "carrier" and the rights of the cargo owner. Until now, respondents have perceived no need to ascertain the irrelevant fact of what company owns and operates the *Queensland Star*. Until its brief on the merits, NS had not made the carrier that "actually transports" the goods the fulcrum of its argument. *See supra* at n.1. Accordingly, now that NS has injected this new issue into the case, respondents have ascertained the true facts of the *Queensland Star*'s ownership, which are publicly available.

("FMC").[3] Every major ocean liner is engaged in such agreements, which reportedly govern the carriage of approximately 90% of all container goods among the major trading nations of Asia, Europe, and North America.[4]

To evidence its contract of carriage with ICC, Hamburg Süd issued a bill of lading to ICC when the goods were loaded aboard the *Queensland Star*. JA 48 (designating ICC as shipper and ICC's U.S. agent, Air Sea International Forwarding Inc., as consignee). After the *Queensland Star* arrived in Savannah, Kirby's cargo was loaded on a NS train pursuant to a contract between NS and Columbus Line USA Inc. ("Columbus Line"), the separately incorporated U.S. subsidiary of Hamburg Süd. *Id.* at 105-09. En route to Huntsville, the train derailed, causing substantial damage to Kirby's equipment. The train, tracks, and crew were all under NS's control. *Id.* at 32. In any event, NS must be presumed negligent, as alleged in the complaint. *Id.* at 33-34.

After the train derailed, NS personnel recorded their expectations of NS's liability. An internal letter dated October 10, 1997, advised that "[o]ur liability is limited by the NS Intermodal Rails Circular to $250,000 per container, and there is a possibility we may receive a claim exceeding our estimate of $820,000." App., *infra*, 1a. Kirby claimed compensation of AUS$2.065 million. JA 36. NS informed Kirby that, "[u]nder [NS's] Circular No. 1-A, which governed this shipment, . . . [NS] shall not be liable for loss damage or delay to lading to any party other than the Rail Services Buyer. NS will not be under any obligation to process any claim by any person other than the Rail Services Buyer." JA 102. The "buyer" under that contract was Columbus Line. "You

[3] *See* 58 Fed. Reg. 43,360, 43,361 (Aug. 16, 1993) (describing agreement between Hamburg Süd and Blue Star); 52 Fed. Reg. 31,446, 31,446 (Aug. 20, 1987) (describing agreement among Blue Star and other carriers); 50 Fed. Reg. 15,224, 15,225 (Apr. 17, 1985) (same).

[4] *See* Mary Reilly, *Identity of the Carrier: Issues Under Slot Charters*, 25 Tul. Mar. L.J. 505 (2001). NS has admitted that vessel sharing and slot charter arrangements are "increasingly prevalent" in the industry. *See* Pet. 27 n.10 (citing Reilly).

should look to Columbus Line for recovery." *Id.* Under the Rail Circular, NS fixed its liability limit at $250,000 per container, or US$2.5 million for the 10 containers in the shipment. *See* Opp. to Mot. for Partial Summ. J., Ex. 5, R. 16.B.4(d).[5] Nothing in NS's Rail Circular ties its rates to the limitation of liability amount of $250,000 per container or imposes as a precondition that the shipper denominate the cargo's value to obtain that liability amount. *Id.*

Kirby sued ICC and Hamburg Süd in Australia (JA 19), and NS was impleaded into that action. NS challenged jurisdiction. The New South Wales Supreme Court rejected NS's argument, upheld jurisdiction against NS, and assessed costs against NS for bringing a meritless challenge. *James N. Kirby Pty Ltd. v. International Cargo Control Pty Ltd.* [2000] NSWSC 289 (10 Apr. 2000). NS refused to pay the court-ordered costs or to engage in subsequent litigation there.

Along with its insurer, Kirby brought this action in the Northern District of Georgia, where NS denied liability and moved for partial summary judgment. NS argued that its liability (if any) was limited to $5,000, based on the limitation and Himalaya clauses in the ICC and Hamburg Süd bills of lading. The court granted NS's motion. Pet. App. 38a.

2. In an interlocutory appeal, the court of appeals reversed. NS contended that ICC had to be Kirby's agent because it could not be a carrier (not having registered with the FMC). Pet. C.A. Br. 25-29. The court of appeals rejected that argument. Pet. App. 10a n.9. Kirby argued that ICC, as a "carrier," was a "principal" in its relationship with Kirby and therefore ICC could not bind Kirby to the contract evidenced by the bill of lading issued by Hamburg Süd to ICC. The court of appeals agreed. Because "Kirby did not itself agree to the terms of the bill," *id.* at 6a, the "pivotal question" was

[5] In NS's currently applicable rail circular, it agrees to "be liable for that portion of the loss or damage caused by NS carrier negligence." Rail Circular No. 2, R. 8.3(d), *available at* http://www.nscorp.com/intermodal/ShowDoc/english/intermodal/system_information/general/intermodal_rules_circular.pdf. Its liability limit per container is still $250,000. *Id.*

whether ICC "had authority to and did bind Kirby to the terms of the bill, including its package limitation and its Himalaya clause." *Id.* at 6a-7a. After a detailed factual analysis of the relevant contracts in the transaction, the court determined that ICC was not acting as Kirby's agent to contract with Hamburg Süd and that Kirby was therefore not bound to the Hamburg Süd bill. *Id.* at 7a.

The court then addressed whether NS was entitled to the liability limitation defenses in ICC's bill of lading. The court explained that *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959), required that a clause purporting to limit a third party's liability had to be drafted "with sufficient clarity to specifically identify those parties." Pet. App. 11a. The court initially concluded that the phrase "other person" was too vague to satisfy *Herd*'s clarity-of-language requirement, so the question was whether NS was covered by the words "servant, agent, or . . . independent contractor." *Id.* Applying well-established doctrine, the court then offered two independent grounds for holding that the ICC Himalaya clause was insufficiently clear to extend the ICC liability limit to NS. *First*, the court held that the clause must be understood to apply only to ICC's own servants, agents, and independent contractors. Because ICC had not engaged NS, it did not fall within the class of beneficiaries. "If Kirby and ICC had intended for the protections of the ICC bill to extend to sub-sub-contractors, they could have said so." *Id.* at 13a.

Second, the court held in the alternative that, "[i]n addition to not having been 'engaged by the carrier,'" NS could not benefit from the Himalaya clause because it was an "inland carrier." *Id.* at 15a. The court explained that, because a Himalaya clause was primarily intended to benefit maritime entities, "a special degree of linguistic specificity" was necessary "to extend the benefits of a Himalaya clause to an inland carrier." *Id.* at 16a. Because rail carriage has its own liability regime, the court reasoned that the Himalaya clause protections were intended to apply only to "parties who are, so to speak, between liability regimes, at the fringes of the sea regime – stevedores, terminal operators, and the like."

Id. at 17a. Accordingly, "if the Himalaya clause is to extend inland, it must say so with specificity, as, for example, did the Himalaya Clause in the Hamburg Süd bill when it clearly identified as among its beneficiaries 'all participating (*including inland*) carriers.'" *Id.* Such a specificity requirement, in the court's view, better comported with "*Herd*'s principle that liability limitations in bills of lading must be narrowly construed." *Id.* at 18a.

SUMMARY OF ARGUMENT

I. Under established principles of agency law, ICC was Kirby's independent contractor. Kirby had no control over ICC's subcontracts of carriage and ICC owed no fiduciary duty to Kirby. Kirby therefore was not bound to the Hamburg Süd bill of lading.

No federal common-law rule trumps that understanding of basic agency principles. No holding of this Court stands for the proposition that a duly issued bill of lading by one carrier can be simply disregarded due to another carrier's bill. The quartet of cases NS cites for its proposed rule – *New Jersey Steam*, *York*, *O'Connor*, and *Acme* – all involved a forwarder acting in its classic role as the cargo owner's agent. This Court thus applied ordinary agency law in holding the cargo owner bound to the terms of the contract entered into by the forwarder as agent for the owner. Even if NS had a plausible theory for a common law rule under this Court's cases, it founders in any current application for multiple reasons, each dispositive: the common law did not allow carriers to contract out of their own negligent acts; any federal common-law rule did not survive *Erie*; and the deregulation of the sea, rail, and air regimes makes highly implausible NS's claim that federal common law has sprung back into existence (after nearly a century of extensive federal regulation) to bind Kirby to a bill of lading to which it is not a party.

The government's preemption argument is similarly novel and similarly unsupported. The government purports to base its preemption theory on a federal "policy" not encapsulated in any statute. The government cites no case from this Court supporting its extraordinary position that Kirby has no rem-

edy in tort for full damages under this "policy" against discrimination in rates, a policy that is all the more anomalous in view of deregulatory statutes that allow the free market to engage in precisely the "discrimination" the government decries. Given the government's own concession that such discrimination is permitted in this case for NS's contract carriage, there is no way this particular suit could stand as an obstacle to any articulable federal purpose.

II. Because the ICC bill of lading is the only contract that is binding on Kirby, the Court must determine whether its Himalaya clause protects NS with the requisite clarity and specificity. Under well-settled canons of contract interpretation explained in *Herd*, limitation of liability clauses must be strictly construed and must specify a well-defined class of beneficiaries. The ICC bill fails to protect NS for two reasons: first, the term "independent contractors" was intended to cover only ICC's independent contractors, not sub-sub-subcontractors such as NS. Second, the term "independent contractors" also lacks the clarity necessary to extend traditionally maritime liability limits to an inland carrier.

III. Kirby's state law tort suit for damages is completely consistent with both parties' reasonable expectations. Virtually every country accepts the "network" principle of liability for intermodal shipments, pursuant to which the liability regime for the particular mode determines compensation for a loss that occurs in that segment. NS reasonably would have expected to be held liable for its negligence, because this Court's decisions for 150 years have precluded carriers from contractually limiting their liability for or exonerating themselves from negligence. NS reasonably would have expected to be sued in tort. Such suits are accepted in every major maritime trading nation against carriers with whom the cargo owner does not have contractual privity, and the theory accepting a tort suit for a negligent actor underlay this Court's decision in *Herd*. NS reasonably would have expected to pay the full loss, because its own Rail Circular – the terms NS imposed as a condition for carrying the goods – committed NS to paying up to $250,000 per container. That amount exceeds the total value of Kirby's claim. If sustained, petitioner's effort to limit its liability to one-third of 1% of the total loss would create grave disincentives for carriers to take care to handle goods properly and would shift the entire risk of loss to shippers. Finally, Kirby would have had no way of knowing that the Hamburg Süd bill would issue for its goods: that company did not own or operate the vessel that carried Kirby's cargo. Under normal slot chartering arrangements, a cargo owner simply will not know who is the "actual" carrier, thus making NS's putative rule completely impracticable in the realities of commercial shipping.

ARGUMENT

I. KIRBY IS NOT BOUND BY THE HAMBURG SÜD BILL OF LADING

A. ICC Was Not Kirby's Agent But An Independent Contracting "Carrier"

1. It is a longstanding and ironclad principle recognized throughout common-law jurisdictions all over the world that "'[a]n independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking.'" *Logue v. United States*, 412 U.S. 521, 527 n.5 (1973) (quoting *Restatement (Second) of Agency* § 2(3) (1958)). An actor that is subject to such control is an agent, but, "[u]nder the law of agency, a principal may be bound by the acts of an agent *only* if that agent acted with actual or apparent authority." *Heckler v. Community Health Servs.*, 467 U.S. 51, 65 n.21 (1984) (citing *Restatement (Second)* §§ 145, 159) (emphasis added).[6] This Court has noted that "the core of agency is a 'fiduciary relation' arising from the 'consent by one person to another that the other shall act on his behalf and subject to his control.'" *General Bldg. Contractors Ass'n*

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[6] The law in Australia, where the Kirby-ICC contract was made, is exactly the same. *See* G.E. Dal Pont, *Law of Agency* §§ 1.6-1.7 (Butterworths Australia 2001) (collecting cases); Resp. Supp. Br. 1 n.1 (explaining why Australian law governs construction of this contract).

v. Pennsylvania, 458 U.S. 375, 393 (1982) (quoting *Restatement (Second)* § 1). The foregoing rules govern the relationship between Kirby and ICC, because non-agent independent contractors "may be anyone who has made a contract and who is not an agent." *Restatement (Second)* § 14N cmt. b.

2. Under the ICC bill of lading, ICC was an independent contractor – a principal in its own right – and not Kirby's agent. The ICC bill of lading made ICC responsible for ensuring that Kirby's goods were delivered to Huntsville. It does not otherwise specify the means of shipment or reserve any control to Kirby. *See* Clause 2.1(a), JA 86 (ICC undertook "to perform . . . the entire transport" itself, or "*in [its] own name* to procure the performance of the entire transport") (emphasis added).[7] The ICC bill of lading confers no authority on ICC to act as Kirby's "agent" with respect to any aspect of the carriage.[8]

The form contract the parties used also demonstrates their decision that ICC would not serve as Kirby's agent in any respect. Through industry practice and custom, the "Negotiable FIATA Multimodal Transport Bill of Lading" (abbreviated "FBL"), *see* JA 78-80, is a document evidencing the forwarder's relationship as a "carrier" to the cargo owner. *See* Jan Ramberg, *The Law of Freight Forwarding* 20-21, 42 (2002); Peter Jones, *FIATA Legal Handbook on Forwarding* 41 (3d ed. 2001). The Eleventh Circuit thus correctly concluded that ICC had no power to bind Kirby to any contract between ICC and any other party. Pet. App. 8a-9a.[9]

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[7] Clause 2.2 reinforces that undertaking, specifying that ICC assumes responsibility "for the acts and omissions of" its subcontractors. JA 86.

[8] NS concedes as much, because it cites no language in the ICC bill of lading for the view that Kirby consensually empowered ICC to act as Kirby's agent. The government acknowledged that "ICC was not Kirby's 'agent' as that term has traditionally been understood at common law, since no fiduciary relationship existed and Kirby lacked authority to direct and control ICC in its performance of the contract." U.S. Br. 12, 27.

[9] Use of the FBL benefits both forwarders and shippers. For forwarders, it enables them to charge a higher rate, to perform additional duties than they would otherwise be able to do for simply arranging transport of the shipper's goods, and to have flexibility in responding to business demands. For the shipper, the FBL – with the forwarder acting as principal for carriage – enables the shipper to work through one carrier to handle all of its transportation needs without being forced to accept contracts from faraway carriers with whom the shipper has little or no contact. It also benefits the shipper because the FBL is a negotiable instrument and appropriate tender for letter of credit terms.

Had ICC and Kirby wanted ICC to act as Kirby's agent – and thereby bind Kirby to subsequent contracts of carriage – they would have used the FIATA form, "Forwarder's Certificate of Transport" ("FCT"). "[A] forwarder issuing an FCT clearly states it does not act as a carrier." Jones at 120. Rather, the forwarder under the FCT acts as the shipper's *agent*, with the FCT "confirm[ing] the forwarder's authority to enter into contracts of carriage on the usual terms of a carrier selected by the forwarder. The forwarder does not assume any responsibility for acts or omissions of carriers in performance of the contract of carriage." *Id.* The FCT also "clearly states that the forwarder is not a carrier," so a forwarder using that form would not subject itself to the "jurisdiction of the [FMC]," *id.* at 120-21, as it would when acting as an NVOCC.

The ICC bill of lading thus falls well within the established principle that an independent contractor is not "rendered an agent simply because he is compensated by the principal for his services. The [principal] must also enjoy a right to control the activities of the [contracting party]." *General Bldg.*, 458 U.S. at 395. *See also In re Coupon Clearing Serv., Inc.*, 113 F.3d 1091, 1099-100 (CA9 1997) (concluding that no agency relationship existed because putative principal's "only right of control with respect to [putative agent] CCS was to require CCS to perform its contracts").[10] Where such

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[10] *See also, e.g., Bonk v. McPherson*, 605 A.2d 74, 78 (Me. 1992) (concluding that a timber cutter was not "an agent for whose actions [the land management company] can be held liable," because the timber cutter had "'contracted to accomplish physical results not under the supervision of the one who has employed [it] to produce the results'") (quoting *Restatement (Second) of Agency* § 14N cmt. b) (second alteration in original). *See also Anderson v. Badger*, 191 P.2d 768, 770-71 (Cal. Ct. App.

control is missing – as it is here – courts deny an agency relationship and hold that the putative agent's actions are not binding on the putative principal.[11] For that reason, this Court has rejected the notion that an independent contractor relationship gives the principal the requisite control over the contractor's actions, because "a rule equating" the independent contractor with the principal-agent situation "would convert every contractual relationship into an agency relationship, a result clearly unsupported by the common-law doctrines." *General Bldg.*, 458 U.S. at 394.

3. By its own concessions, NS acknowledges that ICC could not be Kirby's agent in this transaction. NS has observed (Br. 6) that a forwarder in ICC's position would "profit" from the "rate differentials" between what it would be charged for subcontracting carriage and what it would charge Kirby. Yet such a profit method – in which ICC would not disclose to Kirby the rates that subcontracting carriers would charge – is strong evidence that ICC does not have the requisite "fiduciary relation" to Kirby and that Kirby is not manifesting control over ICC's actions. *General Bldg.*, 458 U.S. at 393. *See also Meyer v. Holley*, 537 U.S. 280, 286 (2003) (agency requires "not only control" but also consent by both parties that the agent will act on the principal's behalf); 1 Floyd R. Mechem, *Law of Agency* § 46, at 29 (2d ed. 1914) ("Who is to be affected by fluctuations in price is often significant. If the one who is to supply the goods is to do so at a fixed price regardless of market fluctuations, there is strong evidence of sale rather than of agency."). Given the clarity of the ICC bill of lading's language – and the absence of any argument from NS that Kirby agreed by contract for ICC to act as its agent – there is no basis for this Court to void the freedom of contract Kirby and ICC enjoyed.[12]

1948) (concluding that "no relationship of principal and agent was created by the agreement" of defendant to deliver a machine ordered by plaintiff, because "[p]laintiff had no right of control over the actions of defendant"; rather, "defendant was to accomplish a certain purpose or result, he alone to choose and follow the means by which it would be accomplished").

[11] *See Servis v. Hiller Sys. Inc.*, 54 F.3d 203, 208 (CA4 1995) (contractors hired to perform repairs and maintenance aboard a vessel "were merely non-agent independent contractors of the United States" because "the United States exercised no operational control over [the contractors'] day-to-day performance of their contractual duties"); *Trautman v. Buck Steber, Inc.*, 693 F.2d 440, 445 (CA5 1982) (contractor engaged to perform maritime salvage work was not an agent of the U.S. that could subject government to liability under the Jones Act because the U.S. "exercised no operational control over the work" and "[a]ll plans for the salvage work were made by [the contractor]").

B. Federal Common Law Does Not Trump Kirby's Contract With ICC

NS argued in the court below that ICC must be Kirby's agent because it could not be a carrier. *See* Pet. C.A. Br. 27 ("ICC Ltd. could, therefore, only act as Kirby's agent."). NS does a complete about-face in this Court, arguing that, even though ICC *is* a "carrier," it nonetheless has the power to bind Kirby to its contracts by operation of law. That argument was never presented to the courts below and therefore has been waived. *See, e.g., Meyer*, 537 U.S. at 291-92 ("[I]n the absence of consideration of that matter by the Court of Appeals, we shall not consider it."). *See also* Opp. 11-13.

In any event, NS's newfound theory is rich in irony: it devises an "actual" carrier rule not so that it can benefit from its own terms and conditions of carriage, but rather so that it can evade them. Under its Rail Circular, NS would be liable for Kirby's entire loss. NS prefers, therefore, to bind Kirby to a

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[12] If there were any ambiguity in establishing ICC as independent contractor and not Kirby's agent, that ambiguity must be construed in Kirby's favor. A bill of lading is a contract of adhesion drafted by the carrier, with the shipper getting the benefit of any ambiguity in it. *See Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 441-42 (1889) (stipulation limiting liability of carrier deemed "contrary to public policy, and consequently void," because shipper "has no alternative" but "to accept any bill of lading . . . or to abandon his business"); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 553 (1995) (Stevens, J., dissenting) (maritime "bills of lading . . . are commonly recognized as contracts of adhesion"). *See* 3 Saul Sorkin, *Goods in Transit* § 13.14, at 13-236 (2004) (provisions are "narrowly and strictly construed against the carrier" particularly where the bill contains "special provisions . . . prejudicial to the shipper" that are "not required by statute").

contract with a carrier, Hamburg Süd, with whom neither Kirby nor NS directly contracted. NS's effort to achieve that result *as a matter of law* must fail. No contract or statute compels that result. NS asks this Court to impose – through judge-made federal common law – a rule that will apply to any transportation intermediary regardless of the intermediary's contractual relationship with the shipper.[13] There are a plethora of substantive and legal problems with NS's newly concocted approach, which it appears never to have advocated before in any other court at any other time. The flaws start with NS's rewording of Question 1.

1. Reworded Question 1 is not presented by this case

Between the filing of its certiorari petition and its merits brief, NS evidently discovered that no cases support an argument that in all circumstances a freight forwarder binds a cargo owner when the forwarder acts as carrier and subcontracts with another carrier to carry the goods. As has been the industry norm for decades, a "carrier" is one that promises to deliver the goods and accepts liability in the event of loss. *See* Ramberg at 25. For that reason, the legal rules that have developed over decades have not rested on which carrier "actually perform[s] the transport," but rather on which

[13] NS cites a comment in Bugden's treatise to the effect that a forwarder can be both principal and agent with respect to the same contract. *See* NS Br. 36 (citing Paul M. Bugden, *Freight Forwarding and Goods in Transit* § 2-01, at 8 (1999)). The only case cited by Bugden in fact involved a very different situation. *See Etablissement Biret et Cie S.A. v. Yukiteru Kaiun KK (The Sun Happiness)*, [1984] 1 Lloyd's Rep. 103. That case involved a charter party (not a freight forwarding) contract in which a party was designated in a sue and be sued clause, which the court held was sufficient under the terms of that contract to deny the putative agent status solely as an agent. Although in other functions and duties the contract specified that party's role as agent for the principal, as to this one the imposition of liability on it as a principal was considered dispositive. That holding does not help NS, however, because, unlike in *The Sun Happiness*, nothing in the ICC bill of lading empowers Kirby to exercise control over ICC or to create a fiduciary duty by ICC to Kirby as to *any* functions performed by ICC.

carrier has "undertaken to procure the performance of the multimodal transport." *Id.* at 26.

In its merits brief, NS changes the wording of Question 1 to focus on whether a forwarder can bind a cargo owner when it enters into a contract with another carrier that "actually transport[s]" the goods. NS Br. i. That formulation is absent from the petition. *See* Pet. i ("carriers to provide that transportation"). This case does not present NS's new question, which is outside the scope of the question this Court granted to review. *See Thornton v. United States*, No. 03-5165, slip op. at 8 n.4 (U.S. May 24, 2004) (declining to address new issues raised outside scope of question presented). Quite simply, Hamburg Süd no more "actually transport[ed]" Kirby's goods than ICC did. Hamburg Süd neither owned nor operated the *Queensland Star*, the vessel that carried Kirby's goods. Given the posture of this interlocutory appeal without discovery being complete, it would be inappropriate for this Court to assume that Hamburg Süd was an "actual" carrier. This was simply not a relevant issue until NS's change of course in its merits brief. Moreover, if accepted notwithstanding the facts, NS's improbable rule of law has the ironic consequence that a forwarder-carrier's bill of lading is superseded by the bill of lading of an ocean carrier that itself does not own or operate the vessel that carries the cargo. Even NS's attempted rationalizations for its newfound theory do not support *that* extreme and unprincipled rule.

2. NS's supposed "150-year-old" rule is a fiction

NS weaves together various materials as supposed evidence that for 150 years the rule has been that a forwarder always binds a cargo owner to another carrier's bill of lading even when the forwarder issues its own bill of lading as carrier. Not only do the *holdings* of this Court's cases not support such a notion, in many instances the very same cases would support a tort suit by a cargo owner in Kirby's situation against a negligent carrier that damaged the goods. Indeed, this Court's cases support the distinction that the rest of the world makes between a forwarder acting as the carrier's agent – when the forwarder has the agency authority to bind

the cargo owner – and when the forwarder acts as carrier, in which case it lacks that power to bind.

a. The holding of *New Jersey Steam Navigation Co. v. Merchants' Bank of Boston*, 47 U.S. (6 How.) 344 (1848), for example, is unrecognizable from the description by NS. (Notably, the government appears to agree by omission that this case is irrelevant.) That case involved a freight forwarder, Harndon, acting as agent for a bank. It thus falls squarely within the principle that an *agent* can bind its principal to a contract, but it provides no support for the view that an independent contractor has that power.

Harndon had a contract with the owners of *The Lexington* reserving a crate for his use so that he could ship goods on each voyage for a flat fee of $250 per month. *Id.* at 379. Harndon sold his services to the public as "a forwarding agent for the community generally," *id.* at 418 (Woodbury, J., concurring), in the traditional manner as a shipper's agent. Both Harndon and the vessel owners sought to limit their liability by contract. *Id.* at 346-47 (contracts set forth in preface to Court's opinion). The owner's bill of lading sought to limit its liability to $200 per package. *Id.* at 347.

Harndon operated under instructions from the Merchants' Bank of Boston to collect large sums in New York from various banks and to transmit those funds to Boston. Harndon's crate, the value of which "was not made known to the carriers, nor a proportionate price paid for its transportation" (*id.* at 419 (Woodbury, J., concurring)), contained $18,000 worth of checks, gold, and silver (*id.* at 379-80). During the voyage, fire broke out and the crate containing the bank's cargo was lost. *Id.* at 351, 378-79.

The bank sued the carrier for the loss of the cargo. As the case came to this Court from a circuit court judgment awarding full damages plus interest for the bank, the carrier made essentially two arguments. First, the carrier sought to deny a right of action to the bank on the ground of a lack of contractual privity: the forwarder (Harndon) had contracted "in his own name" with the carrier. *Id.* at 380. The plurality rejected that argument, because it concluded that Harndon was

the bank's agent: "[I]t was a well-established rule of law, that, where a contract, not under seal, is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue on it." *Id.* at 381.[14] The plurality also concluded that "[t]he cases are numerous in which the general owner has sustained an action of tort against the wrongdoer for injuries to the property while in the hands of the bailee. Those cases show that it may be equally well sustained for a breach of contract entered into between the bailee and a third person." *Id.*

Second, having concluded (consistent with longstanding agency principles) that the bank was bound to the carriage contract (through Harndon's agency), the plurality then rejected the carrier's argument that it could "restrict his obligation even by a special agreement" in that contract. *Id.* at 382. That question, the plurality reasoned, had been "fully considered" in previous cases "and the conclusion arrived at that he could not." *Id.* (collecting cases). As the plurality noted, if the carrier was a common carrier holding itself out as such to the public, the common law operated to make the carrier "an insurer of the goods, and accountable for any damage or loss that may happen to them in the course of the conveyance." *Id.* at 381. If, on the other hand, the carrier was acting in a private capacity through contract carriage, the carrier "incurs no responsibility beyond that of an ordinary bailee for hire,

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[14] It has long been settled law that an agent cannot act for an undisclosed principal unless an agency relationship exists. *See Restatement (Second)* § 186 cmt. a; *Restatement (First) of Agency* § 186 (1933) ("An undisclosed principal is bound by contracts and conveyances made on his account by *an agent acting within his authority*") (emphasis added). As the commentary to § 186 explains: "It is not enough that the proof shows that the one negotiating the contract acted generally for the benefit of the one sought to be charged or because of something initiated by him. *The proof must be that the one making the contract was acting as agent in a matter entrusted to him as agent.*" *Restatement (First)* § 186 cmt. b (emphasis added). The plurality's conclusion that Harndon was the agent of the bank, combined with Justice Woodbury's separate finding of the same relationship, *see New Jersey Steam*, 47 U.S. at 418, constituted a holding of this Court.

and [is] answerable only for misconduct or negligence." *Id.* at 382. Although it noted that the contract language limiting the carrier's liability is "general and broad, and might very well comprehend every description of risk incident to the shipment," the plurality concluded that "it would be going farther than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for wilful misconduct, gross negligence, *or want of ordinary care*, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands." *Id.* at 383 (emphasis added).

The plurality emphasized that, even when the carrier seeks to exempt itself or limit its liability from losses, it "incurred the same degree of responsibility as that which attaches to a private person, . . . bound to use ordinary care in the custody of the goods, and in their delivery, and to provide proper vehicles and means of conveyance for their transportation." *Id.* That principle, the plurality reasoned, "should govern the construction of the agreement in question." *Id.* Although the carrier could limit its liability for incidents beyond its control (e.g., acts of God), therefore, it could *not* limit its liability for losses "occasioned by the *want of due care*, or by gross negligence." *Id.* at 384 (emphasis added).[15] Because the plurality found a "great want of care" by the carrier, "[w]e are of opinion, therefore, that the [carrier is] liable for the loss of the specie, notwithstanding the special agreement under which it was shipped." *Id.* at 385.[16]

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[15] Although a majority determined that *The Lexington* had been operated in a grossly negligent manner, the degree of negligence was unnecessary to the Court's holding invalidating the limitation clause because it had determined that mere negligence voided that provision. *See* 47 U.S. at 382 ("answerable only for misconduct or negligence"), 383 ("want of ordinary care" and "bound to use ordinary care"), 384 ("want of due care"). Kirby's complaint alleges negligence by NS. *See* JA 33-36.

[16] Justice Catron concurred on the ground that "[t]he case depends not on any contract, but on mere tort standing beyond the contract." 47 U.S. at 394. Justice Daniel opined that the case should have been a common-law breach of contract action brought *in personam* in New York. *Id.* at

b. NS thus exhibits complete indifference to the holding of *New Jersey Steam*, which cannot be squared with its assertion that a cargo owner is always bound by a carrier's limitation of liability even if the bill of lading is entered into with a forwarder. It then curiously asserts that this Court "never wavered from the *New Jersey Steam* rule" (Br. 24) when it decided *York v. Central R.R.*, 70 U.S. (3 Wall.) 107 (1865). But *York* no more supports the railroad's fabricated "rule" than *New Jersey Steam* did. *York* also involved the traditional forwarder role as the shipper's agent. *See* Abstract of Record at 4, No. 181 (Dec. Term 1864) ("Thomas Trout was a special agent of the plaintiff"); 70 U.S. at 107-08 (describing in prefatory material to Court's opinion that Trout & Son was working on a commission on account of York as owner of the goods). Indeed, the plaintiff cargo owner York argued that Trout had exceeded its authority as York's agent by agreeing to a contract containing a limitation of liability that York never authorized it to enter. *See* Plaintiff in Error Br. at 12-13, No. 181 (Dec. Term 1864). This Court's opinion explicitly recognized that, far from denying that Trout was York's agent, York's principal argument was that Trout *was* its agent and had exceeded its authority as agent by agreeing to the railroad's stipulation limiting the carrier's liability. 70 U.S. at 113. In holding that the agreements of York's agent, Trout, were imputable to York, the Court stressed that, although a carrier could contractually limit its liability for such incidents as natural perils, a limitation would be unenforceable as to "losses from *negligence* or misconduct." *Id.* (emphasis added). Thus, properly understood, *York* provides no support for NS's argument here: Kirby has never argued that ICC exceeded any agency authority, because ICC was never Kirby's agent. ICC contracted as Kirby's *carrier*, and was

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416. Thus, although he thought the cargo owner should prevail, he did not think jurisdiction had been properly established. *Id.* at 418. Justice Woodbury concurred separately, because "[t]he recovery, in cases like this, on the tort, counting on the duty of the carrier and its breach by the negligent loss of the property, is common, both in this country and abroad, in the courts of common law." *Id.* at 428.

therefore an independent contractor and not an agent. In any event, even if it applied here, the *York* rule would negate NS's attempt to limit its liability for negligence. *Id.*; *New Jersey Steam*, 47 U.S. at 383.[17]

c. NS never invoked *The Lexington* or *York* in the courts below, and argued instead that ICC had to be Kirby's agent because it could not be a carrier. *See* Pet. C.A. Br. 25-29 (relying on *Great Northern Railway v. O'Connor*, 232 U.S. 508 (1914)). Although NS has now abandoned that argument, it seeks to contort *O'Connor* into support for its wholly new contention that a carrier can be both a principal and an agent as to the same obligation. *O'Connor* supports no such theory. That case also involved a classic principal-agent relationship that is absent between Kirby and ICC. NS ignores the facts of that case and takes statements by this Court out of their proper legal context. As in *York*, the *O'Connor* cargo owner had procured the services of a forwarder as agent. The forwarder did not properly value the goods when contracting (on the owner's behalf) with the carrier. When the goods were damaged, the owner brought an action directly against the railroad for the full value of the goods, claiming that the forwarder had no authority to exceed the scope of its agency. *See* O'Connor Br. at 4, No. 996 (Oct. Term 1912) (stressing that the forwarder *was* her agent but that it "had no authority to release the value of the goods of defendant in error").

In rejecting O'Connor's argument, the Court considered the case on a trial record in which O'Connor had stipulated

[17] NS also cites *Reid v. Fargo*, 241 U.S. 544 (1916), as supposed authority for binding a cargo owner to a carrier's bill of lading "even though the express company/forwarder had issued its own bill of lading" (NS Br. 25). But there is no indication in this Court's opinion, the briefs filed by the parties, or the court of appeals' opinion in that case that the forwarder *had* "issued its own bill of lading." Indeed, the Court's holding (241 U.S. at 551) assumed the correctness of the court of appeals' description of the express company as a "mere forwarder" (*id.* at 548). The Court held that the forwarder was liable to the cargo owner for exceeding its authority as an agent when it accepted a bill of lading limiting the carrier's liability to $100 for an automobile worth $3,900. *Id.* at 550-51.

that Boyd was her agent. *See id.* at 4-5. The Court stressed that the forwarder there was acting as O'Connor's agent and not as a carrier in its own right. *See* 232 U.S. at 515. The Court noted that O'Connor had an action against the forwarder for having exceeded its agency authority, *id.* at 514-15, but such an action would be distinct from the type of claim O'Connor would have had if the forwarder had been a carrier.[18] The Court further explained that the railroad's terms were tariffed by operation of statute and thus "open to inspection at every station," *id.* at 515, the implication being that O'Connor and her forwarder-agent were equally on notice of what the rates would be, *id.* Thus, the forwarder bound O'Connor to the terms of the rail rates under agency and filed tariff doctrine principles, neither of which applies here. ICC was not acting as Kirby's agent, and there is no indication that any of the contracts of carriage in this case (ICC's, Hamburg Süd's, or NS's) were tariffed. Certainly if Hamburg Süd had carried these goods under a tariff and such carriage supported its position, NS would have been obliged to raise that two courts ago when it first invoked *O'Connor* under the theory that ICC could only be Kirby's agent. But it has not done so.

d. NS's supposed coup de grace is *Chicago, Milwaukee, St. Paul & Pacific R.R. v. Acme Fast Freight, Inc.*, 336 U.S. 465 (1949), but the holding of the case is completely irrelevant here. This Court held that the forwarder was a shipper in its relation to the rail carrier by operation of *statute* and therefore was limited in bringing a subrogation action within

[18] The Court explained that it did not matter whether Boyd was "treated as agent or forwarder," but it used that unexplained phrase in the context of holding that the railroad was bound by what the "shipper" declared as the value of the goods as imposed by the Interstate Commerce Act ("ICA"). *See* 232 U.S. at 514. The Court explained further that, pursuant to the "tariff rate" in effect, forwarders and cargo owners alike were treated as "shippers" for classification purposes. Because the ICA and filed tariff doctrine are inapplicable, whether ICC had the power to bind Kirby to its agreement with Hamburg Süd is solely a question of applicable agency law.

the time allotted for shippers under § 413 of the Freight Forwarder Act of 1942, 49 U.S.C. § 1013 (1946), which provided that the provisions of the Carmack Amendment (49 U.S.C. § 20(11) and (12) (1946)) would apply to forwarders. *See* 336 U.S. at 487-89. Indeed, only two years before enactment of the Freight Forwarder Act, this Court affirmed a holding that Acme's business was not that of a carrier, so there is not even an apt analogy between Acme and ICC. *See Acme Fast Freight v. United States*, 30 F. Supp. 968 (S.D.N.Y.), *aff'd mem.*, 309 U.S. 638 (1940). The Court explicitly referenced that opinion in the *Acme* case invoked by NS. *See* 336 U.S. at 466.

But even if there were a valid comparison between ICC and the forwarder there, *Acme* stands for the unremarkable proposition that Congress has the power to deem a forwarder to be a shipper for purposes of establishing when the forwarder may bring a subrogation action against the rail carrier for damage to the goods. 336 U.S. at 487. The Court noted that forwarders historically had been denominated as "shippers" in relation to rail carriers, and Congress did not intend the 1942 Act to change that result. *Id.*[19] Importantly, *Acme* says nothing about the rights of a *cargo owner* or a vessel carrier. The Court self-consciously tied its analysis "to find [w]hat Congress intended" in its enactment of rail and freight forwarder statutes that have long since been repealed. *Id.*; *see infra* at n.24. Again, NS takes a few sentences out of context as supposed support for a "rule" that somehow would sustain its argument that the Hamburg Süd bill of lading limits Kirby's recovery in a suit against NS for negligence.[20]

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[19] There is nothing talismanic about a party being deemed a "shipper in relation to the actual carrier." NS Br. 22. That was Columbus Line's relationship to NS. *See* JA 107-09. Yet NS has expressly denied that Columbus Line was Kirby's legal agent. *See* JA 102. Being a "shipper in relation to a carrier" does not transform that entity into the cargo owner's agent with authority to bind the owner to another carrier's bill of lading. The two concepts are simply unrelated.

[20] NS (Br. 19, 30-31) and the government (Br. 28) misread footnote 27 as opining that in all circumstances a forwarder acts for an "undisclosed principal" – the shipper – in its subsequent dealings with carriers. *See* 336 U.S. at 487 n.27. That is not what the Court said. The Court invoked the undisclosed principal doctrine to debunk the error of the court of appeals, which had believed that a forwarder never had a subrogation claim against a rail carrier. The Court explained that, if the forwarder had to pay on a claim for damaged goods to a cargo owner, it had a right of action against the rail carrier in subrogation of the cargo owner's claim against the rail carrier. *See id.* It was well established even at the time of *Acme* that the undisclosed principal doctrine applied only if an agency relationship had already been established. *See supra* at n.14.

e. Taken together, the cases on which NS bases its entire argument on Question 1 fail to support its premise. First, each involves the forwarder as the cargo owner's agent and not as its carrier. Under normal agency principles, the cargo owner would be bound to the bill of lading in those circumstances. *See supra* at 9-10. But that is not the nature of ICC's relationship with Kirby. Thus, whatever each of those cases says about binding the owner to a bill of lading arises in the context of normal agency law that, in this case, is crystal clear in negating an agency relationship between ICC and Kirby. Second, none of those cases involves a second carrier's bill of lading or an effort to bind a cargo owner to the terms of such a bill of lading when it is not a party to that contract.[21] Finally, none of those cases involved a contention that a sub-sub-subcontractor was a beneficiary to a bill of lading so that it could attain a virtually complete exoneration for its negligence. Thus, to describe these cases as announc-

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[21] NS (Br. 30-32) notes that consignees have been held bound to bills of lading in certain circumstances even though they are not formally parties to the contract. That rule does not aid NS here. The point of having a negotiable bill of lading is to enable the holder to transfer its rights to a subsequent holder. When the original shipper negotiates a bill of lading to a consignee, the consignee steps into the shipper's shoes and acquires the right to enforce the shipper's contract against the carrier. This is a longstanding common law rule that has since been codified. *See, e.g.*, 49 U.S.C. § 80105 (Federal Bill of Lading Act); U.C.C. § 7-502(a)(4) (2003). Under the subrogation doctrine, respondent MMI is bound by the ICC bill of lading in the same way as Kirby because MMI's rights are derivative from Kirby's. There is no such doctrine to bind Kirby to the Hamburg Süd bill of lading.

ing a "150 year[]" rule that benefits NS (NS Br. 1) is pure sophistry.

3. NS's "common law" rule cases preclude a carrier from limiting its liability for negligence

Both *New Jersey Steam* and *York* were careful to couch their endorsement of a carrier's right to limit its liability. A plethora of cases consistently has read those two decisions as confining the rule to allow contractual limitation of liability clauses only when the loss could not be attributed to a negligent act of the carrier – even when the cargo owner agreed to a stipulated value for the cargo. *See, e.g., The Queen of the Pacific*, 180 U.S. 49, 56 (1901) (reading *York* as permitting limitation on carrier liability only if it did "not operat[e] to restrict his liability for negligence"); *Constable v. National S.S. Co.*, 154 U.S. 51, 62 (1894) (stating that *York* permitted liability of carrier to be limited by special contract except insofar as there is "any want of due care on his part"). Thus, to the extent there was any "federal common law" rule recognizing a carrier's right to impose a limitation of liability clause, it was limited to damage not caused by the carrier's negligence. That is certainly not the case here, where NS's negligence must be presumed at this stage and where the rail accident in any event was a classic case of *res ipsa loquitur*. *See Reid*, 241 U.S. at 549-50. NS thus derives no benefit from the reimportation of federal common law rules. Even if it could, it would be bizarre to allow NS to invoke a ridiculously low limitation of liability in another carrier's contract for *its* negligence, when its own Rail Circular expressly *accepts* liability for negligence with a relatively high limitation amount. *See supra* at 4-5.

4. Any rule conceived here by NS did not survive *Erie*

Even if those cases did announce something of a common law rule that survived the pervasive statutory and regulatory overlay that gave rise to the filed tariff doctrine, that rule did not survive the decision of this Court in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), which announced that, "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the

state. . . . There is no federal general common law." *Id.* at 78. Because COGSA does not apply to this case – the loss having occurred outside the "tackle to tackle" period, *see* COGSA § 1(e), 46 U.S.C. app. § 1301(e) – there is no conceivable federal statute that "govern[s]" (*id.*) this diversity case. This Court has often reiterated the force of the *Erie* doctrine and has made clear that "federal common law" will be recognized only in "few and restricted" circumstances where a "federal rule of decision is 'necessary to protect uniquely federal interests,' and those in which Congress has given the courts the power to develop substantive law." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (citation omitted). *See, e.g., Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (even where federal statute in "related" field exists, there must be proof that state standard would pose "significant conflict" with federal interest). Nor will this Court "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994) (collecting cases).[22] NS has simply failed to justify a special rule of federal common law under this Court's standards.[23]

In any event, the deregulation of the major transportation industries has radically altered the statutory matrix; vestigial

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[22] Any concern about any conceivable "conflict" between a state rule and a federal statutory tariffed rule is no longer present in light of the deregulation of the railroad industry. *See, e.g., United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979) (noting that uniformity is an insufficient justification to create federal common law even as to federal program – person seeking such rule must prove state law would "frustrate specific objectives of the federal programs").

[23] All of NS's cases but *Acme* were decided before *Erie*, and the Court's analysis in *Acme* is so patently a construction of the Freight Forwarder Act that NS cannot credibly maintain that that case announced a "federal common law" rule.

federal common law principles are of dubious validity.[24] The effect of such legislation "is to make much of the old law concerning the inviolability of tariffs inapplicable." 4 Sorkin § 20.00, at 20-10.[25] This Court has already negated the proposition that lingering federal common law exists for the deregulated airline industry. *See, e.g., American Airlines, Inc. v. Wolens*, 513 U.S. 219, 232 (1995) (holding that Congress did not intend the Airline Deregulation Act "to channel into federal courts the business of resolving, pursuant to judicially fashioned federal common law, the range of contract claims relating to airline rates, routes, or services"); *Morales v. TWA*, 504 U.S. 374, 378 (1992) (noting that ADA's deregulatory thrust was not to increase preemption of state claims but rather to create "maximum reliance on competitive market forces").[26] NS's failure to address this trend underscores how unpersuasive it is to reimport so-called "150-year-old rules" into a radically different regulatory environment that now operates predominantly on freedom-of-contract principles.[27]

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[24] *See* ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (abolishing Interstate Commerce Commission and substantially deregulating rail industry); Ocean Shipping Reform Act of 1998 ("OSRA"), Pub. L. No. 105-258, 112 Stat. 1902; Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. §§ 41713 *et seq.*; Act of Oct. 17, 1978, Pub. L. No. 95-473, § 4(b), 92 Stat. 1337, 1466 (repealing Freight Forwarder Act).

[25] In like fashion, OSRA "eliminates the requirement for ocean common carriers to file tariffs with the [FMC]," 4 Sorkin § 20.02, at 20-15, with such rates now available electronically.

[26] The government itself, with the approval of the Solicitor General, has filed an *amicus* brief under the ADA urging the Fifth Circuit to recognize a state claim as not preempted under the ADA as "better reasoned and more consistent with the modern rule tightly circumscribing the judiciary's power to fashion a federal common law." U.S. *Amicus* Br., *Sam L. Majors Jewelers v. Airborne Freight Corp.*, No. 96-50146, 1997 WL 33560672, at *16 (5th Cir. filed Apr. 18, 1997). The government's assertion of preemption in this case cannot be squared with its anti-preemption position under the deregulatory regime of the ADA.

[27] There is no "special agency" rule in this context. NS Br. 36. In addition to *Acme*, which is inapposite, NS cites 14 Am. Jur. 2d *Carriers*

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What NS seeks, therefore, is breathtaking for its audacity and lack of grounding in statute or this Court's precedent: (1) freedom to enter into its own contracts of carriage with the subcontractor of an ocean carrier that evade limitations on its ability to discriminate in the making of its rates; (2) freedom to avoid the liability provisions applicable to common carriers through such "contract carriage"; and (3) a right to claim the benefits of common-carrier law to impose a federal common law rule that trumps Kirby's freedom of contract to make ICC an independent contractor rather than Kirby's agent. Through that, NS seeks to elude the terms of its own Rail Circular – which would more than compensate Kirby for its loss – so that it may benefit from a bill of lading (Hamburg Süd's) that nowhere else in the world would be held to be binding on Kirby.

C. The Government's Novel Preemption Theory Is Made Up Out Of Whole Cloth

The government offers a completely unsupported conception of "preemption" as a basis for precluding Kirby's "state law damages remedy." U.S. Br. 22. The government's argument is so extreme and ill-conceived that not even NS – which itself has concocted an entirely new argument since the ones it unsuccessfully pressed on the Eleventh Circuit – has made it. Having not been advanced by NS or made or passed on below, the argument is waived. *See, e.g., Reno v. Koray*, 515 U.S. 50, 55 n.2 (1995) (argument made by *amicus* not properly before the Court where not made by a party and not considered by court below); *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981) ("declin[ing] to consider this argument since it was not raised by either of the parties here or below").

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§ 558 (2000), *see* NS Br. 36, but the date of that publication is quite misleading insofar as the authorities cited in that source for the proposition that a cargo owner may be bound to a contract entered into by a deliverer of the goods are state cases from the early 1900s when forwarders routinely acted as agents for shippers and therefore had the authority under settled principal-agency law to bind shippers to contracts of carriage.

In any event, the government's theory rests on the weakest of legal foundations. Notwithstanding that this Court has decided a dozen or more preemption cases in the past decade, the only case the government cites (Br. 22) is *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). But the implied conflict preemption held to preempt a state law damages claim there rested on a statute authorizing a federal standard that the Department of Transportation had adopted. *See id.* at 875-76. This Court held that a state law claim for negligent failure to include an air bag as safety equipment impliedly conflicted with a promulgated federal agency standard that was formally amended numerous times and that "deliberately provided the manufacturer with a range of choices among different passive restraint devices." *Id.* at 875.[28]

There is no similar federal regulation in this case. The government (Br. 22) seeks to obscure that fundamental omission in its argument by outlining a "tariff regime" for rail carriers – but that comprehensive mandatory "tariff regime" no longer exists. *See* ICC Termination Act, *supra*. "There is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988).

[28] This Court's recent preemption cases have all been fought over whether Congress intended federal legislation to preempt state common law claims. *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002) (no preemption of common law tort claim by Coast Guard letter that did not take a position on the issue; Federal Boat Safety Act did not contain express preemption); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (no preemption of common-law negligence claim by medical devices statute); *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995) (no preemption of common-law negligence claim when no federal standard in place); *Cippolone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (no preemption of state common-law claims by federal cigarette labeling statute). None of the cases finding preemption presents a legislative or regulatory regime remotely analogous to the situation presented here, which rests fundamentally on contracts entered into by parties in Australia. *See, e.g., United States v. Locke*, 529 U.S. 89 (2000) (finding preemption from complex web of statutes, international treaties, and federal regulations for oil tankers on subject addressed by state environmental standards); *Geier, supra.*

The government further misunderstands the international multimodal transportation system when it then asserts that a free-floating federal "policy" enables a carrier to obtain a higher carriage rate in exchange for a higher liability limit. *See* U.S. Br. 23. The government's position is astounding now that the rail, air, and sea carriage regimes are predominantly deregulated: large shippers and non-vehicle owning carriers can contract (as NS asserts Columbus Line did with it) to reduce carriage rates and liability limits, thus enabling the free market to determine what carriers can charge for the carriage of an international multimodal shipment.

The government seeks to justify its request for judicial intrusion on the marketplace by objecting to the Eleventh Circuit's rule as "substantially disrupt[ing] established commercial practices by preventing the underlying carrier from linking its rate to its potential liability." *Id.* While noble-sounding in the abstract, that "policy" leads to the truly bizarre result that Columbus Line – which apparently did *not* announce a higher value for the cargo when it contracted with NS to carry Kirby's freight (*see* JA 107-09) – is not precluded from obtaining a remedy under NS's Rail Circular for up to $2.5 million (JA 102), but *Kirby* is limited to $5,000 under the Hamburg Süd bill of lading. The government favors that "solution" without demonstrating how Kirby's suit would conflict with a single federal statutory provision.

Finally, the government is flatly wrong to suggest that the Eleventh Circuit's position means that a cargo owner that deals with Hamburg Süd is bound by the liability limits in its bill of lading, but a cargo owner that deals with an intermediary that then ships through Hamburg Süd is not. By statute, COGSA applies of its own force for the ocean carriage to the United States, so the liability limits in Hamburg Süd's bill are irrelevant in determining the ocean carrier's actual liability if a loss occurs at sea and thus falls within COGSA's scope. The only relevance of the government's position therefore is when a bill of lading extends liability limitations to third parties outside the contract. Given *Herd*'s reluctance to extend liability limitations, and Congress's affirmative decision *not*

to extend COGSA benefits to other performing parties, there certainly is no basis for thinking that an ocean carrier's extensions to third parties should be preferred to an intermediary's that would be known to the party adversely affected by them, the shipper.

As this Court has concluded, when there is no "extant" federal action that "can create an inference of pre-emption in an unregulated segment of an otherwise regulated field, preemption, if it is intended, must be explicitly stated." *Puerto Rico*, 485 U.S. at 504.[29] Yet Congress has made no such explicit statement. "To adopt the imaginative" approach "set forth in the Solicitor General's *amicus* brief" would require this Court to conclude that "repeal of [carrier] regulation" left "behind a pre-emptive grin without a statutory cat." *Id.*

D. NS's Rule Produces Harmful Consequences

The new "American" rule – as NS and the government would have it – would have disastrous consequences for international maritime carriage rules. First, it would disrupt the uniformity now prevailing in all of the major maritime trading nations, which accept the Eleventh Circuit's position. *See* Int'l Professors *Amici* Br. Cargo owners worldwide should not be expected to master NS's "special agency" rule when contracting in their home country for a shipment to the United States, especially when that rule conflicts with principal-agency rules accepted everywhere else.

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[29] The government hides the Achilles' heel of its argument in a footnote (*see* Br. 25 n.9), where it acknowledges that a rail carrier is allowed by statute to engage in rate discrimination through contract carriage. In its invitation brief, the government stated that it had been informed by NS that Kirby's cargo was carried under such a contract. U.S. Inv. Br. 12. There can be no basis for holding *Kirby* to whatever side deal NS struck with Columbus Line USA Inc. – Kirby was not a party to such a contract and has no idea of its terms. Likewise, because the contract carriage removes any possibility of a "conflict" with the supposedly preemptive federal policy, there is no basis for preempting Kirby's suit. *See Geier*, 529 U.S. at 873 (conflict preemption must arise under the "circumstances" presented).

Second, by binding shippers to an "actual" carrier's bill of lading, NS's approach would subject cargo owners to two sets of shippers' obligations rather than just the one to which they agreed. This could include anything from freight rates and lien clauses to liability terms and forum selection clauses. If bound by a second carrier's bill, a cargo owner might be required to pay freight twice; or it might face two wildly divergent limitation provisions in the event of cargo damage; or it might be subject to suit in different countries.

Third, there is no limiting principle to NS's position. If a harsher Himalaya clause is upheld in this case on a "special agency" theory (NS Br. 36), presumably nothing would stop an intermediary from binding a cargo owner to a subcontracting carrier's contract terms that resolve a dispute under some completely different law, contain a completely different choice of forum clause, describe the cargo in a completely different way, value the cargo in a manner inconsistent with the original contract with the intermediary, confer special rights of delivery and acceptance on a consignee that penalize the consignor, or accept a time limitation on causes of action that snuffs out valuable remedial rights. Indeed, under NS's theory, the intermediary could make the cargo owner liable to a subsequent carrier in tort by its own failure to identify goods as especially hazardous and in need of special carriage conditions. That notion, however, would clash with this Court's recognition of "the common-law rule that a principal normally will not be liable for the tortious conduct of an independent contractor." *General Bldg.*, 458 U.S. at 396. In virtually the rest of the world, the cargo owner would have no cause of action against an intermediary-carrier for violating an "agency relationship" because none would have been created. *See* Int'l Professors *Amici* Br. 14-17. Subcontracting carriers would make themselves immune from suit and do so in faraway forums using different law, and cargo owners would functionally have no recourse against the true wrongdoer.

II. THE HIMALAYA CLAUSE IN THE ICC BILL OF LADING DOES NOT PROTECT PETITIONER

For the reasons just given, the ICC bill of lading is the only contract "binding on the person damaged." *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 303 (1959). But NS must still demonstrate that the ICC Himalaya clause exonerates it. *Id.* Applying well-established principles going back to *Herd*, the court below correctly held that the ICC Himalaya clause[30] does not protect NS for two independent reasons: NS is not ICC's "independent contractor," and, as an inland carrier, a greater degree of specificity is needed for the clause to embrace NS. Either holding is adequate to sustain the judgment below.[31] NS's arguments to the contrary go beyond the scope of its question presented, distort the basic contract construction principles that are routinely applied to strictly construe such clauses, ignore two uniform lines of circuit precedent that explain precisely why the Eleventh Circuit was correct, omit any analysis of the reasons why the phrase "other persons" is insufficient to meet *Herd*'s appropriately stringent standard, and misunderstand the parties' intent and reasonable expectations as to the scope of the ICC Himalaya clause.

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[30] The Eleventh Circuit did not rule whether the Hamburg Süd Himalaya clause would protect NS; it was unnecessary to reach the question. But that clause would not protect NS for the reasons that Kirby explained below. Kirby CA Br. 40-52. NS does not address the issue. If this Court were to reverse on the first question, that issue would be open on remand. Respondents have never conceded that the clause would protect NS. *Cf.* P&I Br. 4.

[31] Because the questions presented in the petition challenge only the first of the court's two independent reasons, and the second reason by itself is adequate to sustain the judgment below, this Court should in any event affirm on Question 2. NS's blatant attempt to introduce new issues that are not fairly included in the original questions presented comes too late. *See infra* at 37-38, 42.

A. Himalaya Clauses Must Be Strictly Construed And Limited To Their Intended Beneficiaries

In *Herd*, a negligent stevedore sought to limit its liability for the cargo damage that it had caused during vessel loading by claiming the benefit of the carrier's package limitation. Rejecting the claim, this Court held that neither COGSA nor the bill of lading protected anyone other than the carrier. 359 U.S. at 305. The *Herd* Court left open the possibility that a contractual provision might extend the carrier's limitation clauses to third parties performing the carrier's duties under the contract of carriage, but it narrowly limited this option:

> [C]ontracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries, for they "are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties."

Id. (quoting *Boston Metals Co. v. The S/S Winding Gulf*, 349 U.S. 122, 123-24 (1955) (Frankfurter, J., concurring)).

An entire body of jurisprudence has subsequently developed in the lower courts to apply *Herd*'s limiting principles to construe Himalaya clauses. Justice Kennedy, as a Ninth Circuit judge, stated the applicable principles that were already well-settled in 1985:

> Himalaya Clauses should be strictly construed and limited to intended beneficiaries. The intent to extend COGSA benefits to third parties must be clearly expressed. When a party seeking protection under a Himalaya Clause is not specifically mentioned therein, the party should, at a minimum, be included in a well-defined class of readily identifiable persons to which COGSA benefits are extended under the terms of the clause.

Taisho Marine & Fire Ins. Co. v. Vessel Gladiolus, 762 F.2d 1364, 1366-67 (CA9 1985) (citations omitted).

1. A limitation of liability clause is strictly construed against the party claiming its benefit

This Court has unequivocally stated in this precise context that "contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries." *Herd*, 359 U.S. at 305. That well-established principle has deep roots in contract law. *See, e.g.*, 11 *Williston on Contracts* § 32:20, at 533 (4th ed. 1999) (courts "construe even the most clear and unambiguous exculpatory provisions strictly against the party seeking the benefit of the clause").

NS's contrary argument (Br. 42-43) is astonishing. It ignores the relevant authority and invokes the interpretive rule for federal criminal statutes as though that canon applies to contractual exculpatory clauses. *See* NS Br. 43 (quoting *Singer v. United States*, 323 U.S. 338, 341-42 (1945), replacing a reference to "criminal statutes" with "[words]"). NS claims a 150-year-old common law rule in support of its agency argument by reading the plurality's dicta in *New Jersey Steam* out of context, *see supra* at 16-18, but it ignores the true 150-year-old common law rule embodied in the Court's holding there – an application of the strict construction canon. The Court held that a broad bill of lading clause purporting to limit a carrier's liability for "fire, water, breakage, leakage, and all other accidents," 47 U.S. at 347, did not apply to negligence because the parties could not have intended that the carrier would seek to exempt itself from "the same degree of responsibility as that which attaches to a private person . . . to use ordinary care in the custody of the goods," *id.* at 383.

NS and the government fail to grasp the proper application of this Court's rule that clauses "purporting to grant immunity from, or limitation of, liability [such as a Himalaya clause] must be strictly construed." *Herd*, 359 U.S. at 305. Clauses in which a carrier *accepts* liability (such as Clause 2.2 of the FBL, in which the issuer accepts liability for the actions of "any other person of whose services [it] makes use for the performance of the contract," JA 86) are not subject to

a limiting interpretation. Indeed, these clauses must be read broadly, under the principle that a bill of lading is construed against the carrier. *See supra* at n.12. Language that fails to pass muster in an exculpatory clause context may be acceptable when the tables are turned. Contrary to the government's unsupported assertion (Br. 16), a strong basis exists for this distinction – to protect against a long history of carriers' overreaching.

2. An intent to extend COGSA benefits must be clearly expressed to include a well-defined class of readily identifiable persons

The clarity requirement follows logically from the strict construction rule and the requirement that clauses be limited to intended beneficiaries. A clause cannot be thus limited if the intended beneficiaries are unclear, poorly defined, or not readily identifiable. Those principles have long been widely accepted by the lower courts and relied upon by commercial parties.[32] Even the precise phrase "well-defined class of readily identifiable persons" appears frequently in the cases – including in the only two Himalaya clause decisions NS cites. *See Akiyama Corp. of Am. v. M.V. Hanjin Marseilles*, 162 F.3d 571, 573 (CA9 1998) (citing *Vessel Gladiolus*, 762 F.2d at 1367); *Wemhoener Pressen v. Ceres Marine Terminals, Inc.*, 5 F.3d 734, 743 (CA4 1993) (quoting *Generali v. D'Amico*, 766 F.2d 485, 490 (CA11 1985)). NS's suggestion (Br. 48) that *Herd* permits a Himalaya clause to express an intent to protect a third party only "in some way" ignores not only the *Herd* opinion as a whole but also more than 40 years of federal court jurisprudence.

These well-established general principles have long been applied to the concrete language of actual Himalaya clauses.

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[32] In the House of Lords' most recent Himalaya clause decision, Lord Hobhouse noted the "basic rule of construction of contracts of carriage" that a party seeking "to exclude or limit his liability or to rely on an exemption . . . must do so in clear words. Unclear words do not suffice. Any ambiguity or lack of clarity must be resolved against that party." *The Starsin*, [2003] UKHL 12, ¶ 144 (citation omitted).

The influential Second Circuit, for example, has convincingly explained that a broad phrase such as "any person whose services have been used in order to perform the contract" does not provide the necessary clarity of language. *See, e.g., Rupp v. International Terminal Operating Co.*, 479 F.2d 674, 676 (CA2 1973) (rejecting clause covering "all persons rendering services in connection with performance of this contract"); *Cabot Corp. v. S.S. Mormacscan*, 441 F.2d 476, 478 (CA2 1971) (same).[33] Mentioning "other persons" does not describe a "well-defined class of readily identifiable persons" but purports to extend coverage to those who have *not* been defined or identified at all.

Neither NS nor its *amici* make any effort to rebut the long-established rule of *Cabot* and *Rupp*. NS dismisses (Br. 45) the Eleventh Circuit's careful review of the ICC Himalaya clause and its conclusion (following *Cabot* and *Rupp*) that the overly broad language in the clause does not benefit NS without acknowledging or responding to the court's rationale. *See* Pet. App. 12a (citing *Rupp*).[34] Thus, under the uniform view of every circuit to have addressed the issue, the operative language of the Himalaya clause here covers "servant[s]," "agent[s]," and "independent contractor[s]" whose services have been used to perform the contract.

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[33] Other circuits have followed *Cabot* and *Rupp* approach. *See, e.g., Vessel Gladiolus*, 762 F.2d at 1367; *La Salle Mach. Tool, Inc. v. Maher Terminals, Inc.*, 611 F.2d 56, 59-60 (CA4 1979); *De Laval Turbine, Inc. v. West India Indus., Inc.*, 502 F.2d 259, 264-65 (CA3 1974).

[34] NS's citation of *Wemhoener Pressen* with a parenthetical quoting the broad language discussed in that opinion, *see* NS Br. 43, does not purport to respond to the Eleventh Circuit's analysis. In any event, it would be an inadequate response. The Fourth Circuit, relying on two references to subcontracting in the Himalaya clause before it, explained that the "clause defines third party beneficiaries as subcontractors who take part in performance of the carriage." 5 F.3d at 743. Because the defendant was a stevedore "acting as [the carrier's] agent," *id.*, and it was performing a "peculiarly maritime activity" (as opposed to inland carriage), *id.*, the Fourth Circuit held that it was entitled to the benefit of the package limitation as the carrier's agent. It did not question the long-established rule of *Cabot* and *Rupp*.

Not only does the phrase "other person . . . whose services have been used in order to perform the contract" lack the necessary clarity, NS is unable to rely on it for another reason. The interpretation of this language goes well beyond the questions presented in the petition. When NS sought this Court's review, it framed Question 2 in the context of a bill of lading clause covering "'independent contractors' used to perform the contract of transportation,"[35] and it asked only which "independent contractors" should be covered by those terms. *See* Pet. i.

NS has now completely rewritten Question 2 to ask how a much broader clause should be interpreted.[36] *See* NS Br. i. But this new question is not "fairly included" in the question that this Court agreed to decide. *See Yee v. City of Escondido*, 503 U.S. 519, 535-38 (1992); Sup. Ct. R. 24.1(a). This is not one of "the most exceptional cases" justifying this Court's "address[ing] the unpresented question." *Yee*, 503 U.S. at 535 (citation omitted). As was true of the additional question in *Yee*, "[t]he lower courts have not reached conflicting results," *id.* at 537, on the treatment of "other persons" clauses, *see supra* at 35-36 & n.32. Accordingly, NS's and its *amici*'s arguments based on the "other person" phrase,

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[35] Without any bow to its own double standard, NS describes the Eleventh Circuit's "turn[ing] its knife to the phrase 'any independent contractor'" and "silently excis[ing] the word 'any'" (NS Br. 45) after NS itself omitted "any" before "independent contractor" in its petition Question 2.

[36] NS has also transformed an issue about federal maritime law to one of contract interpretation. The change is palpable. The petition questions whether "the federal maritime law" supports the Eleventh Circuit's holding on the privity of contract aspect of the Himalaya clause question. NS's merits brief omits the reference to maritime law and poses the new question simply as a matter of contract interpretation. *Compare* Pet. i. *with* NS Br. i. NS's revision is rich in irony because the Opposition closed by noting that the real question raised in the case involved "an analysis of the Australian contracting parties' intent – not an issue of federal law." Opp. 30. Now that NS apparently agrees, the Court may wish to consider whether to dismiss the writ as improvidently granted.

NS Br. 43-46; U.S. Br. 13-16; P&I Br. 9-11, 14, are not only erroneous, they are not properly before the Court.

B. The ICC Himalaya Clause Does Not Protect ICC's Sub-sub-subcontractors

The court of appeals correctly held that the ICC Himalaya clause does not protect NS for two independent reasons, either of which sustains the judgment below on this issue. We address each in turn.

1. As a sub-sub-subcontractor, NS is not covered by the ICC Himalaya clause's plain language

The clause protects only ICC's independent contractors, not Columbus Line's independent contractors or ICC's sub-sub-subcontractors. The language in the ICC bill of lading must be interpreted in context. When the Himalaya clause speaks of a "servant," for example, it cannot be referring to all of the world's servants. (If it were, there would not be a "well-defined class of readily identifiable persons.") The term "servant" only makes sense describing an employment relationship and thus the existence of an employer. Similarly, "agent" implies a principal, and "independent contractor" another contracting party.[37] That language therefore must refer to *ICC's* servants, agents, and independent contractors. No other usage makes sense.

Clause 10.2 (JA 94) confirms this reading. The Himalaya clause covers only those parties for which ICC "act[s] . . . as agent or trustee." ICC would have no authority to act for parties with which it did not contract, and thus the Himalaya clause could not cover them.[38] In his authoritative treatise,

[37] A "servant" is defined as "[a] person who is employed *by another* to do work under the control and direction of the employer," *Black's Law Dictionary* 1399 (8th ed. 2004) (emphasis added); "agent" as "[o]ne who is authorized to act for or in place *of another*," *id.* at 68 (emphasis added); and "contractor" as "one who contracts to do work or provide supplies *for another*," *id.* at 350 (emphasis added).

[38] Clause 2.2 (JA 86) does not defeat this reading. Language that is overly broad in the context of the Himalaya clause, and lacks the requisite clarity, *see supra* at 35-36, is entirely permissible in Clause 2.2, *see supra* at 34. Arguments to the contrary misunderstand the proper application of the strict construction rule.

the chair of the FBL's drafting committee confirms this reading. *See* Ramberg at 68 (noting that the FBL Himalaya clause protects "the *Freight Forwarder's* servants, agents and other persons") (emphasis added).[39] Just last year, the House of Lords concurred with that analysis:

> Ordinarily understood the word "independent contractor" in the context of a head contract means a third party with whom a party to a contract enters into a contract under which the third party contracts to perform some or all of the obligations which that party had undertaken to perform under the head contract, in other words, a subcontractor.

The Starsin, [2003] UKHL 12, ¶ 28 (Lord Bingham) (quoting trial court). At least in British English, the ICC Himalaya clause would cover "a subcontractor," but not a sub-sub-subcontractor. It would require a beneficiary to enter into a contract with "a party to [the head] contract," not with some third party. American English demands the same result, particularly in light of the strict construction canon.

[39] In his *amicus* brief in this case, Prof. Ramberg also confirms that the FBL Himalaya clause was not intended to protect sub-subcontractors. *See* Ramberg Br. 5 n.6. The P&I Clubs criticize the court of appeals' "emphasis on the intent of the drafters of the FBL," arguing that it undermines the intent of the actual parties. P&I Br. 21. But the entire purpose of a standard form is to achieve uniform results wherever the form is used. *See generally, e.g.*, Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. Rev. 429, 439-40 (2002). Indeed, NS implicitly advocated for the uniform interpretation of FBLs when it sought this Court's review in this case on the ground that "the FBL [is] the most widely used shipping document in international multimodal transport." Pet. 26; *see also* Pet. 2. By choosing to use a standard form, the parties expressed their intent to adopt the meaning given to that standard form by those who wrote and promulgated it. Prof. Ramberg's intent is unquestionably relevant.

2. The parties did not intend the ICC Himalaya clause to cover ICC's sub-sub-subcontractors

NS asserts its preferred view of the parties' supposed intent (Br. 43-46) without offering any evidence or reasoned analysis. Every available indication of the parties' intent, however, is contrary to NS's view. The plain language of the contract shows the intent to cover only ICC's independent contractors. *See supra* at 3. The person most likely to have formed a specific intent with regard to this specific language has confirmed his intent to cover only subcontractors. *See supra* at 39 & n.38. One party to the contract (Kirby) has consistently asserted its intent, both here and in the courts below. NS's intent is legally irrelevant, but at the time of the accident even NS did not intend to benefit from either Himalaya clause. *See* App., *infra*, 1a; JA 100, 102.

To the extent prior judicial decisions shaped the parties' intent, the weight of appellate authority accords with the Eleventh Circuit here (as NS has admitted, Pet. 25-26). At the time of the transaction, every reported appellate decision would have informed the parties that relational language in a Himalaya clause would protect only those third parties that had contracted with the issuer. Prior to *Akiyama* (which was decided almost 16 months after ICC issued its bill of lading), even the Ninth Circuit adhered to the rule that "[w]hether an entity is an intended beneficiary of a Himalaya Clause depends upon the contractual relation between the party seeking protection and the [carrier issuing the bill of lading containing the Himalaya Clause]." *Vessel Gladiolus*, 762 F.2d at 1367; *see Mori Seiki USA, Inc. v. M.V. Alligator Triumph*, 990 F.2d 444, 450 (CA9 1993). The Second Circuit's rule was also well established by 1997. *See Mikinberg v. Baltic S.S. Co.*, 988 F.2d 327, 333 (CA2 1993); *Toyomenka, Inc. v. S.S. Tosaharu Maru*, 523 F.2d 518, 521-22 (CA2 1975).

In *Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959), this Court declared that it would "not stretch the language when the party drafting . . . a form contract has not included a provision it easily might have." *Id.* at 183. That approach would quickly resolve this case, because NS cannot

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carry its burden of ensuring that the necessary language is in the bill of lading.[40] The maritime commercial world has long recognized the need for greater specificity when seeking to extend Himalaya clause protection beyond an issuer's immediate subcontractors, and specific language to accomplish that goal has long been readily available. *See, e.g., Himalaya Clause Subcommittee Report*, Maritime Law Ass'n doc. no. 652, at 7902, ¶ 4 & n.4 (David R. Owen ed., 1984) (recommending use of the language "direct and indirect servants, agents and independent contractors of the Carrier, as well as their respective servants, subagents or subcontractors" for parties seeking "to accomplish the goal of including subagents and subcontractors within the protection of COGSA," and warning "that typical Himalaya Clause language covering merely 'servants, agents and subcontractors' of the carrier will not extend the protections of COGSA to subcontractors of the carrier's independent contractors"); J.W. Richardson (ed.), *The Merchants Guide* 37 (Int'l ed. 1995) (reprinting P&O's standard bill of lading, which covers "any independent contractor employed by the Carrier in performance of the Carriage and any sub-sub-contractors thereof"). These widely available sources show language intended to protect parties not in privity with the issuer. Because "the party drafting [the FBL] form contract has not included a provision it easily might have," *Monrosa*, 359 U.S. at 183, NS's claimed expansive coverage presumably was not intended.

C. The ICC Himalaya Clause Does Not Protect Inland Carriers

The court of appeals also correctly held that the ICC Himalaya clause does not protect NS for a second, independent

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[40] The P&I Clubs' suggestion (Br. 11-12) that the burden should be on innocent cargo owners to ensure that marginal third parties are excluded from Himalaya clauses, rather than on negligent tortfeasors and their defenders to ensure that marginal third parties are included, would eviscerate *Herd*. After all, no contractual provision excluded the *Herd* stevedore from the benefit of the carrier's package limitation. The default rule is full liability the consequences of negligence. *See* 359 U.S. at 308.

reason that is also adequate to sustain the judgment below. The clause was intended to protect only maritime parties such as stevedores and terminal operators, not inland carriers.

1. Question 2 does not challenge this holding

NS has baldly rewritten Question 2 to mask the petition's failure to challenge the Eleventh Circuit's alternate holding that inland carriers are not embraced within the language of ICC's bill. *Cf.* NS Br. i *with* Pet. i. The new question is not "fairly included" within the question this Court granted certiorari to resolve. *See* Opp. 24-25; *Yee*, 503 U.S. at 535-38; Sup. Ct. R. 24.1(a). This is not an "exceptional case[]." *Yee*, 503 U.S. at 535 (citation omitted). Given the petition's failure to challenge the alternate holding denying protection under the ICC Himalaya clause for "inland carriers," there is a "heavy presumption" (*id.* at 537) against this Court's resolving NS's new Question 2, particularly given that the Eleventh Circuit's alternate holding still renders advisory any decision by this Court on the rewritten "privity" issue.

2. "Independent contractors" covers only maritime parties such as stevedores and terminal operators

NS concedes (Br. 47 n.16) that Himalaya clauses were invented to benefit stevedores. Even a cursory review of the jurisprudence demonstrates that the clause's benefits have been claimed mostly by stevedores and others that work in the port area. "[A]ll of [the Eleventh Circuit's] prior Himalaya clause cases" have involved "a stevedore or other provider of port services," Pet. App. 15a, and the same is true for most circuits. This lack of cases is both a cause and an effect of the industry's understanding that the typical Himalaya clause does not extend to protect inland carriers.

Many factors contribute to this situation. The typical purpose of a Himalaya clause is to extend a sea carrier's maritime-oriented defenses to its subcontractors. COGSA, by its own terms, applies only to the ocean voyage – from loading to discharge. *See* COGSA § 1(e), 46 U.S.C. app. § 1301(e). Applying maritime defenses to inland carriers is often nonsensical. *See, e.g., Vistar, S.A. v. M/V Sea Land*

Express, 792 F.2d 469, 471-72 (CA5 1986) (rejecting a trucker's claim that it was entitled to the "error-in-navigation" defense of COGSA § 4(2)(a), 46 U.S.C. app. § 1304(2)(a), when the truck hit a low bridge). Thus, most parties drafting Himalaya clauses do not intend them to extend to inland carriers. And, if they do intend broader coverage, they use specific language to indicate this intent. *See, e.g.*, JA 60 (¶ 1(g)), 63 (¶ 5(b)).

The usual solution to the problem of inland carriers' damaging cargo (and the one explicitly adopted in the FBL, *see* JA 92-93) is the "network" system that fixes the carrier's liability by "the particular legal regime applicable to the carrier on whose line the loss occurred." 3 Sorkin § 14.15[3][a], at 14-98. The FBL's drafters assumed that damages on a railroad would be covered by the liability regime applicable to railroads and saw no need to extend Himalaya clause protection to railroads. Moreover, as one of NS's most-cited authorities has observed, extending Himalaya clause protection to inland carriers under a network system "creates an inconsistency which may make the bill of lading ambiguous on this issue." *Id.* at 14-99. Avoiding that ambiguity is yet another reason why the FBL's drafters rationally chose not to include a broad Himalaya clause covering inland carriers.

The commercial parties' understanding that a typical Himalaya clause will not protect inland carriers is confirmed and reinforced by the fact that, in every reported decision on point, the courts of appeals have held that Himalaya clauses do not protect inland carriers. *See Caterpillar Overseas, S.A. v. Marine Transp., Inc.*, 900 F.2d 714, 725-26 (CA4 1990) (holding that trucker was not "independent contractor" because of "settled rule that limitations of liability are to be 'narrowly' construed"); *De Laval Turbine*, 502 F.2d at 269-70 (rejecting argument that "bailee" adequately expressed parties' intent to encompass inland carrier).

NS's response (Br. 48) – that these cases involved ocean bills of lading – is both deceptive and irrelevant. The *De Laval Turbine* contract included delivery at least a short distance inland, 502 F.2d at 261, which is why an inland carrier

was involved. And, in *Caterpillar Overseas*, the parties contractually agreed to the inland move. 900 F.2d at 717. The relevant point is that the inland carriers in *Caterpillar Overseas* and *De Laval Turbine* were doing the same thing that NS claims to have been doing here – performing obligations under the contract of carriage.

The reported decisions not only confirm the understanding that a typical Himalaya clause would not protect inland carriers, but also inform the parties' understanding that the ICC Himalaya clause would not protect a railroad. There is no need to "stretch the language when the party drafting . . . a form contract has not included a provision it easily might have." *Monrosa*, 359 U.S. at 183. The maritime commercial world has long recognized the need for greater specificity when seeking to extend Himalaya clause protection to inland carriers, and specific language to accomplish that goal has long been readily available. *See, e.g.*, Richardson at 37 (reprinting P&O's standard bill of lading, which covers "road and rail transport operators"); JA 63 (¶ 5(b)). Because "the party drafting [the FBL] form contract has not included a provision it easily might have," 359 U.S. at 183, it presumably did not intend the expansive coverage claimed by NS.

III. KIRBY'S SUIT COMPORTS WITH THE PARTIES' REASONABLE EXPECTATIONS

A. NS Would Expect To Be Responsible Under The "Network" Principle

Virtually the entire world – with the apparent exception of Venezuela – accepts the "network" principle, pursuant to which liability for an international multimodal shipment will generally be governed by the liability rules applicable for each "mode" of the journey. *See* International Academy of Comparative Law, *Multimodal Transport: Carrier Liability and Issues Related to the Bills of Lading* 42 (Kiantou-Pampouki ed. 1998) (noting that Venezuela was the only country to have adopted uniform liability system; in the "rest of the reporting countries, the network system applies"); id. at 249 (noting that United States "uses the network systems approach" such that "each mode of transportation has its own

carrier liability regime"). Thus, NS would have had no basis for thinking that a "unimodal" rule of liability would apply, giving it the benefits of the substantially lower sea carriage limited liability regime. No court in the United States has ever imposed such a rule.

NS's expectation that the network principle would govern is amplified by its own Rail Circular, which addresses "Intermodal" shipment of containers and pickups from seaports. Yet under the limitation of liability provision, the circular makes no mention of reliance on any ocean carrier's liability limits and in fact stresses that the circular is what governs the railroad's own liabilities. *See* R. 16.B.4(d).

B. NS Would Expect To Be Liable For Its Negligence

This case falls four-square within the rule announced in *New Jersey Steam*, *York*, and post-Carmack Amendment cases that a carrier may not contractually limit its losses arising from its own negligence. The cases upholding limitation of liability provisions all take care to allow such limitations for damage only when carrier negligence was not at issue (*e.g.*, acts of God). *See, e.g.*, *Boston & M.R.R. v. Piper*, 246 U.S. 439, 445 (1918) ("the carrier may not exonerate itself from losses negligently caused by it"); *York*, 70 U.S. at 113 (stipulation limiting loss does not apply to carrier's "losses from negligence or misconduct"). Yet NS's assertion of a liability limit of $5,000 – one-third of 1% of the total damages – is very nearly an assertion of complete exoneration, a principle long ago rejected as against public policy. *See, e.g.*, *Liverpool*, 129 U.S. at 441-42 ("an express stipulation by any common carrier . . . that he shall be exempt from liability for losses caused by the negligence of himself or his servants, is unreasonable and contrary to public policy, and consequently void"). NS's current assertion, moreover, is inconsistent with its own Rail Circular, under which NS accepted liability for its negligence. *See* R. 16.B.4(c).

NS's proposed regime would create substantial disincentives for carriers to take care to deliver goods in sound condition – and would lead paradoxically to precisely the *opposite* of the original common law rule of full liability that treated

the common carrier as an insurer of the goods. To make matters worse, ocean carriers could readily collude with inland carriers to provide contractual limitations of liability for especially low through carriage rates. The market system would work imperfectly in this respect, because cargo owners' insurers would bear all the risk of loss without the "actual" carrier having any incentive to take care of the goods. Insurers would have no recourse but to raise premiums, which in turn would make the costs of carriage to a consignor or consignee increasingly expensive. What has made the system work efficiently to date is the assurance that wrongdoers can be held accountable for their negligence, often by insurers exercising their subrogation rights. NS has no reasonable expectation of receiving a free pass for its negligence.

C. NS Would Expect To Defend A Tort Suit

Nor does NS have any basis for thinking that it could somehow be immune in this transaction against a tort suit for its own negligence. In keeping with its imaginative use of snippets of language in this Court's cases, NS invokes the seventh edition of an English treatise, *see* James S. Henderson, *Carver's Carriage by Sea* § 67, at 93 (7th ed. 1925), for the proposition that a cargo owner may not sue a negligent carrier if the owner "consented" to the carriage. *See* NS Br. 31. The thirteenth edition of that treatise, however, notes that "Judge Carver . . . fail[ed] to foresee the future importance of a cargo owner's right to sue in tort in respect of mishaps to his goods," and thus the seventh edition "sparsely discussed the matter" in the passage quoted by NS. *See* 1 Raoul P. Colinvaux, *Carver's Carriage by Sea* ¶ 121, at 122 (13th ed. 1982). In fact, the thirteenth edition canvasses English cases to establish that the seventh edition failed to anticipate developments in the law that clearly permit injured cargo owners to sue negligent carriers in tort, and it was simply wrong on the point invoked by NS as ostensibly representing the "law" in the mid-1920s: from the late nineteenth century, English law recognized that an injured cargo owner could sue a negligent carrier in tort even when the owner was not in privity of contract with the carrier.

The modern trend has firmly embedded that principle in the law: "Thus, it may now be generally stated that, although a shipowner is not in a contractual relationship with the owner of goods lost or damaged in transit, the [carrier] will be liable to their owner in tort if the loss or damage arose from lack of reasonable care of the goods by him or his servants." *Id.* ¶ 123, at 125. That fundamental principle has long been accepted by the House of Lords in England, *see Dorset Yacht Co. v. Home Office*, [1970] A.C. 1004 (applying *Donoghue v. Stevenson*, [1932] A.C. 562); the Supreme Court of Canada, *see Cominco v. Bilton*, [1973] Lloyd's Rep. 261, 272, 273; and in the major European maritime trading nations of Germany, France, and the Netherlands.[41] Thus, as with its main submission that the forwarder-carrier's bill of lading must be disregarded as a matter of law, NS's argument is based on antiquated notions of law that have long been superseded. *See also Scruttons Ltd. v. Midland Silicones Ltd.*, [1962] A.C. 446 (permitting tort suit against carrier's independent contractor that caused damage in transit to owner's goods). In *Herd*, this Court recognized the same principle, upholding an injured cargo owner's right to sue a stevedore in tort for damage to goods, even though the cargo owner was not in privity of contract with the stevedore. 359 U.S. at 298.

D. NS Would Expect To Pay For The Entire Loss

NS's Rail Circular contemplates the railroad's liability for $250,000 per container, which would equal an amount in excess of the US$1.5 million value of the goods damaged in the

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[41] *See* Ralph De Wit, *Multimodal Transport* § 14.18, at 453 (1995) ("with the relatively recent development of the tort of negligence, any case in which a servant or an independent contractor of the carrier negligently damaged a cargo owner's goods immediately opened the pathway to a direct action in tort") (footnote omitted), § 14.23, at 456 (France solved the problem of tort against a third party not in privity by calling it a "contract" action), § 14.25, at 458 (in Netherlands, "the third party's act or omission [in damaging goods in transit] constitutes a tort"), § 14.37, at 470 (in Germany, "[t]here is nothing against a contracting party bringing an action in tort as against a third party who performed all or part of the other contracting party's duties").

derailment. In the aftermath of the accident, NS's personnel anticipated that its own circular would fix its liability. Shortly after the derailment, an NS official reported internally that a Kirby engineer was on the scene to assess damage from the derailment, that "[o]ur liability is limited by the NS Intermodal Rules Circular to $250,000 per container, and there is a possibility we may receive a claim exceeding our estimate of $820,000." App., *infra*, 1a; *see also* JA 100, 102. Then NS's lawyers began advancing various arguments – a different theory in the district court, Eleventh Circuit, and now this Court – to evade its own liability limits. The NS corporate officers' expectation comports with the settled rule of full liability for negligence. *See Herd*, 359 U.S. at 300, 308 (affirming judgment for full damages); *The Ansaldo San Giorgio I v. Rheinstrom Bros.*, 294 U.S. 494, 496 (1935) (carrier "cannot contract for relief from liability for his own negligence," and "measure of the shipper's recovery is normally the market value of the goods at destination, in like condition as they were when shipped").[42] Notwithstanding its representation here that NS expected to be protected under the Hamburg Süd bill of lading, therefore, its post-accident conduct reflected just the opposite – that NS would be bound by the liability limits of its Rail Circular.

E. Kirby Would Have Had No Way Of Knowing The Hamburg Süd Bill Would Apply

The parties' reasonable expectations would have been further informed by the virtual impossibility of Kirby's learning

[42] NS's contention that its expectations were altered by the absence of any stipulated value for Kirby's cargo lacks merit. NS Br. 39. NS's $250,000 limit is its "standard" limit, to which all normal freight applies. *See* Rail Circular, R. 16.B.4(d). By contrast, NS's "Carmack Liability Provisions" expressly remove that $250,000 per container limit. *See id.*, R. 16.C.3. Neither the terms and conditions for intermodal shipment nor the shipper's instructions in NS's circular impose any requirement to declare a freight value if the contents of the container are worth less than $250,000. *See id.*, App. A. A shipper can seek a higher limit, but only through a signed writing by an authorized NS official. *See id.*, R. 16.B.4(d).

the terms of a subsequent carrier's bill of lading issued to ICC. Certainly ICC had no fiduciary duty to share those terms with Kirby. NS's entire premise in developing its so-called "150-year rule" rests on the assumption that Hamburg Süd was the "actual carrier" of Kirby's cargo. NS Br. 22. NS further asserts that, because the vessel name *Queensland Star* was on the ICC bill of lading, Kirby had notice that the Hamburg Süd bill of lading would be issued as evidencing carriage by the "actual" carrier. *Id.* at 35. Both in theory and in fact, that premise is completely false.

Kirby could not have seen the vessel name *Queensland Star* on the ICC bill of lading until after that bill was issued. Because it was a "shipped on board" bill of lading, *see* JA 78, 79, it could not have been issued until the ship was ready to sail – two months after Kirby had completed its contract with ICC, *see supra* at 2, and too late for Kirby to object even if it had been aware of the ocean carrier's bill of lading terms.

Even if Kirby had learned of the *Queensland Star* in timely fashion, Kirby would have had no way of knowing that having its cargo loaded on that vessel would necessarily result in the issuance of a Hamburg Süd bill of lading. Blue Star's ownership of the vessel might have suggested that a Blue Star bill of lading would have been issued. Even if Hamburg Süd had owned the vessel, a Blue Star bill of lading might have been issued if Blue Star had chartered slots from Hamburg Süd (instead of the other way around). Indeed, it is also possible that a third carrier, such as Australia New Zealand Direct Line – which is also a party to sharing agreements with Blue Star and Hamburg Süd for the Australia to North America routes (*see supra* at n.3) – might have issued the bill of lading for carriage on a Blue Star or Hamburg Süd vessel. Kirby would not have had any practical basis for knowing whether the "actual carrier" – Blue Star, as it happens – or a slot charterer would issue the bill of lading. Each carrier in a slot charter arrangement typically uses its own bill of lading forms – so cargo aboard the *Queensland Star* would be carried under bills of lading from several different carriers, only one of which would be the "actual carrier." Because vessel

sharing arrangements are prevalent, NS's principal argument rests on a fallacy – regardless of which company owns the vessel. With 90% of container cargo in major trade routes being carried under sharing agreements, there is no practical means for the cargo owner to ascertain who is the "actual carrier." The real world simply does not operate in NS's "actual carrier" fantasyland. Companies contract as "carriers" by accepting responsibility and liability for carriage; they subcontract with other companies to do the carriage; in many instances they put cargo they promise to carry on the ships and vehicles of other carriers; and the cargo owner rarely has any idea who is handling the cargo or under what subcontracted terms. Only when a tortfeasor fails to handle the goods with due care – as NS did here – do the various subcontractual relationships come to light. Thus, there is no basis in logic, law, equity, or commercial practice to support an assumption that Kirby would have had any inkling that Hamburg Süd's bill of lading would be issued as evidence of a contract to carry Kirby's cargo, much less what the terms of that bill of lading would have been.

* * *

The plain truth here is that NS seeks from this Court a blanket protection from liability that is one-fifth of a penny on the dollar compared to its own rail circular expectations. It brazenly seeks that relief in the form of a one-size-fits-all federal common law rule that would cement in law an entire sector of the international transportation industry (intermediaries) regardless of the facts underlying their method of operation. And it seeks that rule notwithstanding its unwillingness to accept similar liability limitations when offered as part of legislative compromise solutions. *See* Opp. 29; Resp. Supp. Br. 7 n.9. This Court should not impose a rule that negates the rights of international parties to contractual freedom.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted,

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Counsel for Respondents

May 28, 2004

APPENDIX

October 10, 1997
File: 34-Derailment

Mr. D. N. Zureich:

Reference earlier discussion today concerning derailment of Train 319 in Alabama and our lading estimate of $820,000.

I have since found out that Mr. David Crawley, Plant Manger, General Motors, Athens, Ala., is on the scene with our Supervisor (N. C. McBride). Mr. Crawley has with him an engineer from Kirby Engineering in Australia.

These gentlemen advise that the value of the lading in the four containers is approximately $3 million. These containers, along with 50 others were shipped from South America, and contain all the parts necessary to put together an assembly line to make aluminum power steering pumps for General Motors. The value of the entire shipment (54 containers) is $17 million.

Our liability is limited by the NS Intermodal Rules Circular to $250,000 per container, and there is a possibility we may receive a claim exceeding our estimate of $820,000.

As information, I have personally spoken with General Manager Manion and advised him of the above information.

P. M. Davis

CC: M. D. Manion – GM West
J. R. Miller – File WK 12394
G. P. Roach – Control Center

(26)

Supreme Court, U.S.
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No. 02-1028

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY PTY LTD D/B/A/ KIRBY ENGINEERING, MMI GENERAL INSURANCE, LTD.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

Respondents' brief is long on indignant rhetoric, but remarkably short on authority. They fail to cite a single case holding that an ocean carrier's bill of lading is unenforceable against the cargo owner because the bill was issued to a freight forwarder that itself had liability to the cargo owner as a carrier. This is scarcely odd because the authorities are universally to the contrary. Respondents' entire argument is founded on the flawed premise that the Hamburg Süd bill of lading is simply a carrier-to-carrier subcontract between ICC and Hamburg Süd. To the contrary, the longstanding federal rule (established by this Court under the common law and the Interstate Commerce Act, and adopted by the Shipping Act that governs this transaction) is that a forwarder-carrier like ICC is a shipper (not an initial carrier) in contracting with transportation carriers, and those contracts are binding on the cargo owner that entrusted its goods to the forwarder-carrier for shipment. Pet. Br. 22-36. Respondents fare no better with their arguments regarding the ICC Himalaya clause. Their attempt to convert *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959), into a rule of contract reformation cannot be squared with this Court's cases.

1. Much of respondents' brief is an exercise in distraction. Respondents begin with the far-fetched claim that Norfolk Southern ("NS") has radically shifted position between its petition and merits brief, such that its argument turns on whether Hamburg Süd owned the ship that carried Kirby's goods. Resp. Br. 1-2, 14-15. Respondents use this supposed "change of course" as an excuse to go beyond the record and introduce new evidence that Hamburg Süd "apparently" transported the goods "under a 'slot charter.'" *Id.* at 3, 15.

Respondents' argument is contrived. NS has in no way changed its position; there is no substantive distinction between the phrasing "provide that transportation" (Pet. i) and "actually transport the owner's goods" (Pet. Br. i). The

rewording only underscores the difference between vessel carriers and forwarder-carriers, and that the owner is the true party-in-interest because *its* goods are being transported. Even if *arguendo* there were an inadvertent substantive difference, the petition's question presented controls, Sup. Ct. R. 24.1(a), and NS's arguments in the petition and the merits brief are exactly the same. Compare Pet. 14-23 with Pet. Br. 22-39. Moreover, respondents' assertion that they could not have raised this issue until now is disingenuous. The petition repeatedly referred to Hamburg Süd as the vessel carrier that actually transported the goods, Pet. 2, 6, 8, 13, 14; if these were relevant misstatements, which they are not, respondents were obliged to object to them in their opposition or else the objection is waived. Sup. Ct. R. 15.2. Instead, respondents affirmatively represented to this Court that "Hamburg Süd *carried the cargo itself* on the ocean voyage from Sydney to Savannah, Georgia." Opp. 5 (emphasis added).

Whether Hamburg Süd carried the goods on its own ship or by slot charter is irrelevant to the question presented.[1] In either event, Hamburg Süd is a carrier under COGSA and an "ocean common carrier" under the Shipping Act.[2] Nothing in the Hamburg Süd bill turns on that fact. The bill fixes the rights and duties of the "carrier," broadly defined as "Columbus Lines, which is the trade name used by [Hamburg Süd], the Carrier named on the face side thereof, the vessel, her owner, operator, demise charterer, time charterer, voyage charterer, space or slot charterer, subcarrier and substitute carrier, whether acting as carrier or bailee." JA 59.

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[1] This explains why respondents (as they concede) made no effort in the district court to ascertain whether Hamburg Süd used the common slot-charter arrangement to carry these goods. Resp. Br. 3 n.2.

[2] 46 U.S.C. app. § 1301(a) ("The term 'carrier' includes the owner *or the charterer* who enters into a contract of carriage with a shipper") (emphasis added); M. Reilly, *Identity of the Carrier: Issues Under Slot Charters*, 25 Tul. Mar. L.J. 505, 510 (2001) ("traditional analysis" treats "each Slot Charterer [as] a COGSA carrier with respect to its own cargo"); 46 U.S.C. app. § 1702(16) (defining "ocean common carrier").

The sole issue presented in Question 1 is whether the ocean carrier bill of lading issued by Hamburg Süd is enforceable against the cargo owner. This is the single through bill of lading for door-to-door transportation pursuant to the Shipping Act, see Pet. 3-4, under which the ocean and inland carriers transported Kirby's goods. "Norfolk Southern did not issue its own bill of lading, but instead acted under the Hamburg Süd bill." Pet. App. 4a. The Hamburg Süd bill by its terms indisputably extends the COGSA liability limitations to NS as a participating carrier (as the Eleventh Circuit acknowledged). Pet. Br. 11, 22-23. Accordingly, the issue to be decided by this Court is the enforceability of Hamburg Süd's bill, and its method of carrying the goods on the ocean leg of the journey has no bearing on that question.

Respondents' second attempt at obfuscation is to raise belatedly issues of fact regarding NS's rules circular, boldly ignoring the record and relying upon "discovery materials produced by NS, and correspondence that would be available in discovery." Resp. Br. 2. This argument is both waived and irrelevant. In the district court, respondents raised the alternative defense to summary judgment that, if any contractual limitation of liability applied to NS, it was the limit of the circular, Pet. App. 32a, but made no showing creating a genuine issue of fact that the circular negated the limitations extended to NS by the Hamburg Süd bill of lading. The district court ruled that the Hamburg Süd bill was a through bill of lading "which the defendant contracted and performed under" and which "unambiguously" protected NS. *Id.* at 37a. Rather than challenge that holding on appeal, respondents abandoned any reliance on the circular. They stated that "[t]he Hamburg Süd bill of lading may have been the 'one which [NS] contracted and performed under,' as the district court suggested," Resp. CA Br. 24, and relied solely on the argument that the Hamburg Süd bill did not bind Kirby. The Eleventh Circuit resolved the case on that basis. Pet. App. 4a, 6a-11a. The effect of the rules circular is thus

not before this Court. Regardless, respondents' arguments are irrelevant because the circular does not displace the Himalaya clause of the ocean carrier's bill of lading. *Canon USA, Inc.* v. *Norfolk S. Ry.*, 936 F. Supp. 968, 974 (N.D. Ga. 1996).[3]

It is clear why respondents wish to divert the Court's attention from the question presented: if the vessel carrier's contract of carriage in its bill of lading cannot be enforced against the cargo owner, then COGSA itself is nullified. Pet. Br. 36-37. Respondents rejoin that the applicability of COGSA does not turn on the carrier's bill of lading, making the astonishing claim that "COGSA applies of its own force *for the ocean carriage* to the United States, so the liability limits in Hamburg Süd's bill are irrelevant in determining the ocean carrier's actual liability if the loss occurs at sea and thus falls within COGSA's scope." Resp. Br. 29 (emphasis added). That is misleading; COGSA only applies to "*contracts for carriage* by sea of goods to or from ports of the United States" manifest in bills of lading. 46 U.S.C. app. § 1312 (emphasis added); *see also id.* §§ 1300, 1302. COGSA only "regulates the terms of ocean carriage by the indirect but highly efficacious device" of imposing statutory mandates as "compulsory terms" in the ocean carrier's bill of lading. G. Gilmore & C. Black, Jr., *The Law of Admiralty* § 3-25, at 145, § 3-38, at 172 (2d ed. 1975); 1 T. Schoenbaum, *Admiralty and Maritime Law* § 10-15, at 650 (4th ed. 2004). Respondent's counsel has elsewhere acknowledged this. Sturley, *Overview*, at 282-83; *see also id.*

[3] The circular is instead part of the carrier-to-carrier subcontract with Hamburg Süd that caps Norfolk Southern's total indemnity in circumstances where the per-package COGSA limits extended by a bill of lading are inadequate (such as containers holding hundreds of small, valuable packages, like cameras or gyroscopes), or where the shipper can prove the inapplicability of the COGSA limits (such as lack of fair notice). *Cf.* M. Sturley, *An Overview of the Considerations Involved In Handling The Cargo Case*, 21 Tul. Mar. L.J. 263, 329-32, 340-47 (1997) ("Sturley, *Overview*") (discussing those defenses to COGSA limitations).

at 347-48 (noting that COGSA authorizes carriers to set liability limits above the statutory floor in bills of lading).

Thus, if the vessel carrier's contract of carriage cannot be enforced against the cargo owner, then the *mandatory* statutory COGSA limitations on carrier liability cannot be enforced against the cargo owner who uses a forwarder-carrier, even as to losses at sea. World Shipping Council ("WSC") Br. 5-6 & n.7. Moreover, even respondents do not contest that their position would nullify the statutory provision empowering vessel carriers to extend the mandatory COGSA limitations beyond the tackle-to-tackle period by contract, 46 U.S.C. app. § 1307, thus frustrating the national policy by which Congress encourages carriers to "place all of their dealings under COGSA, if they so intend." *Wemhoener Pressen* v. *Ceres Marine Terminals, Inc.*, 5 F.3d 734, 741 (4th Cir. 1993). And, it is precisely because COGSA would be wholly nullified, both as to its mandatory and its permissive provisions, that a federal rule regarding the enforceability of carrier contracts of carriage is compelled. *See id.*; Gilmore & Black, *supra* §§ 3-19 & 3-20, at 130, 133 (carrier liability under foreign bills of lading determined by federal law); D. Robertson et al., *Admiralty And Maritime Law In the United States* 326 (2001); *American Dredging Co.* v. *Miller*, 510 U.S. 443, 447 (1994). The federal rule compelled by COGSA is the very rule that is established by 150 years of this Court's common carrier precedents, and that is also compelled by the Shipping Act's mandate that nonvessel carriers like ICC are "shippers" in their dealings with vessel carriers: namely, that the cargo owner is bound by the contracts that the forwarder-carrier makes with the vessel carrier to transport the owner's goods. Pet. Br. 22-39.[4]

[4] Respondents' puzzling argument that the enforceability of an international maritime bill of lading is governed by state law under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), Resp. Br. 24-25, was not raised in their opposition, and (just like its now abandoned argument in its supplemental brief that foreign law applies) is waived. *Baldwin v. Reese*, 124 S. Ct. 1347, 1352 (2004); Pet. Supp. Br. 4-5. The *Erie* argument is

2. Respondents' accusation that NS has "fabricated" this federal rule, Resp. Br. 19, is heavy with irony, given that the initial brief cites a wealth of carrier cases and treatises recognizing this rule, Pet. Br. 32-36, and respondents cannot muster one that adopts their position. Respondents instead strain to distinguish all of this Court's common carrier cases as involving not forwarder-carriers like ICC, but "a forwarder acting in its classic role as the cargo owner's agent." Resp. Br. 7. Their distinctions are untenable, and their invocation of general Restatement principles of agency disregard the specialized rules that have developed in response to the practical necessities of common carriage.

Respondents try to distinguish *New Jersey Steam Navigation Co. v. Merchant's Bank*, 47 U.S. (6 How.) 344 (1848), on the ground that the party (Harnden) that contracted with the vessel carrier was the bank's agent. Resp. Br. 16. Respondents fail to address the part of this Court's opinion explaining why that is so. The parties had disputed whether Harnden was an ordinary agent for the bank, or a nonvessel carrier contracting with the vessel carrier. Pet. Br. 23. This Court held that it did not matter. Even if Harnden had contracted as a carrier with the banks, nonetheless in contracting with the vessel carrier he was "*considered in law the agent or servant of the owner*, and the possession of the agent is the possession of the owner." 47 U.S. at 380 (emphasis added). Thus, Harnden's contract with the vessel carrier was "in contemplation of law" a contract between the vessel owner and the cargo owner. A nonvessel carrier's contract with the vessel carrier binds the cargo owner.

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baseless in any event; it is premised on the flawed claim that neither COGSA nor the Shipping Act applies to the ICC-Hamburg Süd contract of carriage, and disregards that an ocean bill of lading is a maritime contract subject to maritime law. 1 Schoenbaum, *supra* § 10-11, at 622; *see also Cincinnati, New Orleans, & Tex. Pac. Ry.* v. *Rankin*, 241 U.S. 319, 326-27 (1916) (interstate bills of lading are governed by federal law).

The Court mandated a similar rule in *Great Northern Railway* v. *O'Connor*, 232 U.S. 508 (1914). Pet. Br. 27-29. Respondents claim that the cargo owner in that case (O'Connor) had "stress[ed] that the forwarder *was* her agent" in her brief to this Court. Resp. Br. 20-21 (citing O'Connor Br. at 4-5, No. 996 (Oct. Term 1912)). It is hard to fathom how respondents can make that representation. O'Connor's brief never says that. Instead, on those very pages, O'Connor invokes a case in which the Utah Supreme Court had held that a cargo owner was not bound by a contract of carriage that a drayman had executed with the railroad, because the relation between the cargo owner and the drayman "'was that of shipper and carrier rather than that of principal and agent.'" O'Connor Br. at 4-5 (quoting *Benson* v. *Oregon Short Line R.R.*, 99 P. 1072, 1074-75 (Utah 1909)). O'Connor argued that *Benson* was "good law" governing her case, and thus there was "no valid contract between [the parties] releasing the value of the goods in question." *Id.* at 5, 7. Thus, O'Connor's lead argument to the Court was the very one that respondents advance now.

This Court rejected that argument and held the cargo owner bound to the liability limitations to which the forwarder agreed. The Court noted that Boyd was "a forwarder, engaged in collecting a number of small shipments from various persons in order to fill a car and obtain the lower rates applicable to carload shipments." 232 U.S. at 514; cf. Pet. Br. 25-26 (discussing forwarder-carriers under the Interstate Commerce Act). Nonetheless, under longstanding precedent, such a forwarder was a "shipper" in contracting with the rail carrier. 232 U.S. at 514. As a shipper, the forwarder bound the cargo owner to the carrier's terms even if it acted against the owner's instructions:

> [T]he Transfer Company had been entrusted with goods to be shipped by railway, and, nothing to the contrary appearing, the carrier had the right to assume that the Transfer Company could agree upon the terms of the

> shipment . . . . The carrier was not bound by her private instructions or limitation on the authority of the Transfer Company, whether it be treated as agent or Forwarder.

Id. A forwarder is a shipper in dealing with the transportation carrier, and its contracts bind the owner who entrusted the forwarder with its goods.

Respondents likewise cannot distinguish *Chicago, Milwaukee, St. Paul & Pacific Railroad* v. *Acme Fast Freight, Inc.*, 336 U.S. 465, 484 (1949). The surface freight forwarders at issue in *Acme* are identical to nonvessel forwarder-carriers like ICC: they issue their own bills of lading, contractually assume the liability of a carrier from origin to destination, select the transportation carriers, and contract with those carriers in their own names and for their own profit. *Id.* at 478-80, 484-85. As such they are distinct from a traditional "agent-forwarder." *Id.* at 484. Forwarder-carriers have a "duality of character." *Id.* at 468. Even though in "their relations with shippers, forwarders unquestionably perform functions and have duties similar to the functions and duties of common carriers," nonetheless they "occupy a different position in their dealings with the carriers whose services they utilize." *Id.* at 477-78. They are "shippers *vis-à-vis* carriers." *Id.* at 479. Because the cargo owner entrusts its goods to the forwarder to ship with the rail carrier, the owner "is the undisclosed principal of its agent, the forwarder, in the latter's contract with the carrier." *Id.* at 488 n.27 (citing *New Jersey Steam* and *Great N. Ry.*). This is not a rule "for purposes of establishing when the forwarder may bring a subrogation action against the rail carrier for damage to the goods," Resp. Br. 22, for indeed forwarders are not subrogees, 336 U.S. at 488 n.27. Rather, this Court's precedent establishes that forwarders are shippers in contracting with the carrier for service, not just for damages actions. *Great N.*, 232 U.S. at 514. *Great Northern* and *Acme* are fatal to respondents' position.

Finally, respondents fail to reconcile their stance with the rule that "the bill of lading is a contract between the transportation company and him who is interested in the shipment." *Michigan Cent. R.R.* v. *Mark Owen & Co.*, 256 U.S. 427, 430 (1921). They answer that the endorsement of a negotiable bill of lading transfers contract rights to an endorsee, Resp. Br. 23 n.21, but that doctrine does not explain *Mark Owen*. Rail bills of lading are almost always straight, not negotiable, bills. Stephen G. Wood, *Multimodal Transportation: An American Perspective on Carrier Liability and Bill of Lading, in Multimodal Transport* 236, 264 (A. Kiantou-Pampouki ed. 2000) ("Kiantou-Pampouki"). *Mark Owen* and the other cases cited (Pet. Br. 30) turn on a separate common carrier doctrine (applicable to rail and sea bills alike): namely, that the consignor is deemed the "agent" of the consignee who owns the goods. R. DeWit, *Multimodal Transport* § 5.2 (1995). "It is presumed that the contract is made between the carrier and the owner of the goods, and it does not matter who actually has paid or has agreed to pay the freight." *Id.*; 1 Schoenbaum, *supra* § 10-10, at 6-18; A. Dobie, *Handbook on the Law of Bailments and Carriers* § 154, at 497 (1914). Indeed, the $500-per package limitation adopted in COGSA is predicated on the understanding that the owner-consignee is bound even if he was not the shipper. See 1 *The Legislative History of the Carriage of Goods By Sea Act and the Travaux Preparatoires of the Hague Rules* 302 (M. Sturley ed. 1990). [5]

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[5] The common law has long recognized that a cargo owner who authorized shipment was bound by the ocean carrier's contract of carriage even where he was not a party to the contract. Pet. Br. 31. Respondents claim (Br. 46-47) that the 13th edition of Carver's treatise shows the rule petitioner cited to have been superseded by the recognition of tort actions against carriers. That is false. The same page they cite verifies the common law rule that "[w]here . . . goods have been shipped with the consent of the owner, though not under contract with him, he will not be in a position to claim against the shipowner *for the consequences of a tortious act*, if the shipowner is exempted from liability for such acts by

Agency in common carrier law thus does not depend upon conformity with Restatement criteria, such as fiduciary duty, disclosure of profits, or right of control. Agency is attributed based upon the exigencies of common carriage. The carrier often does not deal with the owner (the real party in interest), and cannot inquire into title, Pet. Br. 27 n.6, and the contractual terms on which it agrees to transport the goods are illusory if the owner is not bound.

Similarly, in the common law of connecting carriage (which would not apply to forwarders, who are shippers, *Acme*, 336 U.S. at 478-80 & n.17), an initial carrier who accepted payment for the entire journey but did not issue a through bill of lading beyond its lines was deemed the "agent" of the shipper in contracting with a connecting carrier. *Atlantic Coast Line R.R.* v. *Riverside Mills*, 219 U.S. 186, 195 (1911) (discussing law prior to the Carmack Amendment). Agency there also had nothing to do with Restatement factors; the carriers were not controlled by the owner, obligated to disclose profits from connecting carriage, or fiduciaries in any sense different from a forwarder-carrier.

The Restatement "restates" general agency principles; it does not purport to restate specialized carrier law, much less to abrogate rules of carrier law established or recognized by

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the contract with the shipper." 1 R. Colvinaux, *Carver's Carriage By Sea* § 121 (13th ed. 1982) (emphasis added). The seminal case is *DeLaurier & Co.* v. *Wyllie*, in which Lord Kyllachy, joined by a majority of justices on this point, held that a charter party limiting liability would be enforced against the owner regardless of whether the shipper of the iron were an agent or principal, for "so far as [the owners'] claim is rested on their property in the iron and the defendant's negligence," the defendants "had no notice that the iron was not the property of the shippers, who were in possession of the iron." 17 Scot. L. Rep. 148, 163 (1889). "[I]f he (the owner) chooses, instead of shipping the goods himself, to entrust them to the charterers, and then allows them (the charterers) to ship them in their own name, his title to the goods is and must be qualified, by the contract of affreightment which the charterers have lawfully made." *Id.* at 164; *accord id.* at 158-59 (Shand, J.).

this Court. Carrier law deems as "agency" what in Restatement terms may be the investiture of a "power" to bind the owner to the carrier's contract. See *Restatement (Second) of Agency* §§ 1 cmt. g, 6 (1958). The result is the same. An owner's entrustment of goods to another to deliver to a carrier constitutes authority to bind the owner to the carrier's terms. 14 Am. Jur. 2d *Carriers* § 558 (2000). This principle binds Kirby to the ICC/Hamburg-Süd contract.[6]

3. The Shipping Act lays the issue to rest. A nonvessel-operating common carrier (NVOCC) is expressly defined by the 1984 Shipping Act to be "a shipper in its relationship with an ocean common carrier." 46 U.S.C. app. § 1702(17)(B). When Congress uses a term like "shipper" with established legal meaning in a statute, it is presumed to intend that meaning. *INS* v. *St. Cyr*, 533 U.S. 289, 312 n.35 (2001). Under *Great Northern* and the FMC rules that preceded the 1984 Act, a forwarder that assumed carrier liability towards its customers was still a shipper (and thus agent of the actual shipper) in transacting with the transporting carriers. Pet. Br. 32-34. Kirby does not dispute that ICC is an NVOCC. See Resp. Br. 11; D. Robertson & M. Sturley, *Recent Developments In Admiralty and Maritime Law at the National*

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[6] *York Co. v. Central R.R.*, 70 U.S. (3 Wall.) 107 (1865), does not involve a forwarder-carrier, but it refutes respondents' claim that the enforcement of a carrier's contract against the owner is resolved by general agency principles. York claimed that Trout & Sons was "a special agent of the plaintiff only for the purchase and shipment of cotton," authorized only to place the goods with the railroad as a common carrier with duties of an insurer fixed by law. No. 107, Abstract of Record 4. York contended it was entitled to a jury trial on whether Trout & Sons exceeded its authority in negotiating what was then a "special and unusual contract" reducing the railroad's liability (which, if proven, would invalidate the contract under agency principles). York argued that "authority ... may be implied, but not from the mere possession of goods with the authority to ship." *Id.* at 14. This Court disagreed. The railroad was entitled to rely upon the terms of its contract of carriage, for "[s]o far as the defendant could see, [Trout & Sons] were themselves the owners." 70 U.S. at 113.

Level and in the Fifth and Eleventh Circuits, 27 Tul. Mar. L.J. 495, 565, 567 & n.671 (2003) (discussing "treatment of the status of NVOCC's" by Eleventh Circuit and remarking that "ICC Ltd. was at least a non-vessel-operating carrier"); Ramberg Br. 10 (a freight forwarder issuing an FBL is an NVOCC); U.S. Br. 28. Thus, Kirby is bound by ICC's contract with Hamburg Süd.

Not only does the very definition of an NVOCC under the Shipping Act compel this result, but any other outcome would frustrate the Shipping Act. Respondents wrongly insist that ocean shipping was deregulated both at the time of the shipment and now. Resp. Br. 29. That was not true in 1997 (when ICC contracted with Hamburg Süd), and it is not true today. In 1997, Hamburg Süd was obligated to "file with the [Federal Maritime] Commission . . . tariffs showing all its rates, charges, classifications, rules, and practices" for through inland transportation, including its bill of lading or other document manifesting the transportation agreement. 46 U.S.C. app. § 1707(a) (1994); JA 60 ¶ 2. Carriers could not provide service that deviated from the tariff, nor could they discriminate against any shipper, including NVOCCs. 46 U.S.C. app. § 1709(b) (1994); Pet. Br. 34-35; U.S. Br. 24-25. It would violate the Act for one shipper to receive tariffed service where the liability of the vessel carrier and connecting inland carriers to the owner was defined by the COGSA limits in the tariffed bill of lading, and for the NVOCC to purchase the same tariffed service without any such limitation. See 46 U.S.C. app. § 1709(b)(1), (4), (6), (10), (11) (1994); Pet. Br. 35. The structure of the Shipping Act thus confirms that a forwarder-carrier like ICC is a shipper whose contracts of carriage bind the owner.[7]

[7] The Government conceives of *Great Northern* as a preemption decision, and urges the Court to decide the case on this basis. U.S. Br. 20-26. Respondents counterargument that preemption "rests on the weakest of foundations," Resp. Br. 28, is ill-considered; the filed rate doctrine is a preemption doctrine that precludes assertion of state (or foreign) law rights in contravention of the tariff. *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 226-28 (1998). Thus, this Court may invoke preemption if it were to assume that respondents could assert a nonfederal right of action in disregard of the contract of carriage. But it would be artificial to assume such a right, when federal law dictates a contrary rule under both COGSA and the Shipping Act. *Great Northern* was predicated on the status of forwarders as shippers under federal law, and on the carrier's entitlement to rely upon the owner's entrustment of its goods to the forwarder as authority to accept the carrier's terms. 232 U.S. at 514.

Under the Ocean Shipping Reform Act of 1998, tariffs are still mandatory although publication occurs by accessible electronic databases, not filing with the FMC, and the statute still proscribes departure from tariffs and specified discrimination. The filed rate doctrine still applies. WSC Br. 10, 16-17; U.S. Br. 24-25; 1 Schoenbaum, *supra* § 10-2, at 575-78.

4. Notwithstanding the clarity of federal law, and the commands of COGSA and the Shipping Act, respondents claim that this Court should align federal law with supposed international norms. This argument lacks force. First, Congress has always steered its own course: "the United States today has a law governing the carriage of goods by sea that is different on its face from the laws of most of our major trading partners and different in application from the law of any country anywhere." M. Sturley, *The Proposed Amendments to the Carriage of Goods by Sea Act: An Update*, 13 U.S.F. Mar. L.J. 1, 3-4 (2001). Indeed, the U.S. is almost alone in asserting preemptive jurisdiction over contracts of carriage for trade *into* the country, precisely so that federal law will prevail. Sturley, *Overview*, at 283.

Second, there is no "uniformity now prevailing in all of the major maritime trading nations." Resp. Br. 30. In respondent's counsel's words, there is only a "confused international situation" with a "breakdown in uniformity of the law governing an ocean carrier's liability for cargo loss or damage." M. Sturley, *The United Nations Commission on International Trade Law's Transport Law Project: An Interim View of a Work in Progress*, 39 Tex. Int'l L.J. 65, 68 (2003). Parties to an overseas contract of carriage can only know their rights by familiarizing themselves with the *national* law that

governs the transaction. The laws in the various civil-law and common-law nations are a crazy quilt of different conventions, mandatory national laws, and rules concerning the legal status of forwarder-carriers, actions in tort versus contract, the right of an owner to sue a connecting carrier or subcontractor, and defenses of the latter under the principal contract of carriage. DeWit, *supra* § 15.1 (noting that "the fundamentally different positions which exist in various legal systems regarding this matter would appear to" frustrate efforts at a uniform approach); see generally *id.* §§ 1.1-3.4, 14.1-16.19; Kiantou-Pampouki, at 63, 69-268.

The international law professors supporting respondents skirt this problem by analyzing only the subsidiary question of whether certain countries would regard a forwarder-carrier as an agent. They are careful not to suggest, however, that such nations would subject a carrier to unlimited liability for damage to goods in disregard of the contract of carriage simply because the cargo owner used a freight forwarder. The British commonwealth nations are a case in point. American law apparently diverges from British law in treating forwarder-carriers as shippers, and not carriers, in their dealings with other carriers. H. Bennett, *The Commission and the Common Law* 71-72 (1964). British courts nonetheless reach the same result as petitioner urges on the theory of "sub-bailment on terms," whereby the cargo owner engaging a forwarder-carrier to procure transportation from vessel carriers consents (impliedly or expressly) to the vessel carrier's terms of carriage. This doctrine permits a sub-bailee (the vessel carrier) to assert the terms of its contract with the bailee (the forwarder-carrier) in a suit against it by the bailor (the cargo owner) for loss or damage to the goods, even though the owner is not a party to the sub-bailment contract.[8]

[8] DeWit, *supra* § 14.40 (citing British and Canadian cases, and noting similar results under Dutch law); M. Davies, *The Elusive Carrier: Whom Do I Sue and How*, 1991 Aus. Bus. L. Rev. 230, 235 (under this doctrine, "a sub-contracting sea-carrier may rely on the terms of its contract with the forwarder-carrier in an action brought by the shipper or consignee of the goods"); *Sonicare Int'l, Ltd. v. East Anglia Freight Terminal Ltd.* [1997] 2 Lloyd's Rep. 48, 53-54 (finding implied consent to vessel carrier's terms that were more onerous than the freight forwarder's terms).

Respondents err in claiming that "nowhere else in the world would [the Hamburg Süd bill of lading] be held binding on Kirby." Resp. Br. 27. No international norm confers the windfall respondents seek.

5. Petitioner's brief sets out the policy ramifications of abandoning longstanding federal law. Pet. Br. 36-39. The United States and the World Shipping Council confirm that such a change would severely disrupt existing commercial practice. U.S. Br. 23-24; WSC Br. 3-6, 16-18.

Respondents' policy-based arguments cannot overcome federal law, but are in any event meritless. Respondents wish to make this into a case about the railroad's reliance or the fairness of limiting the NS's liability to "a ridiculously low limitation" of $500 per package. Resp. Br. 24. But these misguided complaints are directed at the COGSA per-package limitations (which their counsel has elsewhere defended, M. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5) (Part II)*, 19 J. Mar. L. & Com. 157, 201-03 (1988)), and the policy of COGSA and the Shipping Act to authorize the ocean carrier to extend COGSA limits to inland carriers in through bills of lading. Pet. Br. 3-9. In this vein, respondents' repeated invocation of a "network liability" legal regime, where special rules should allegedly apply to railroads, is of no moment. No mandatory liability regime governs rail carriage; the Hamburg Süd bill did not adopt network liability principles; and given the Shipping Act's requirement of through rates for door-to-door ocean transport, any attempt by a carrier to adopt "the 'network liability scheme' is legally in doubt.'" 1 Schoenbaum, *supra* § 10-4, at 600. Hamburg Süd indisputably extended the COGSA limits to NS, as it had the legal right to do. The only issue is whether the Hamburg Süd bill can be enforced.

Not only can respondents offer no authority that would render the vessel carrier's bill unenforceable, but they offer no sound policy why the rights and duties of the carriers who transport and handle the goods should be defined not by their own standard contracts on which all carriers and service providers rely, but instead on a middleman's contract. That contract is wholly unknown to them (and may not even protect them, depending on the fortuity of whether a given forwarder-carrier has included an adequately worded Himalaya Clause). See *Acme*, 336 U.S. at 480 ("The underlying carrier's haul involves a different shipment, a different consideration, a different origin, a different destination, and a different consignor and consignee than are involved in the forwarder's undertaking."); WSC Br. 11.

Finally, respondents claim unfairness to the cargo owner, even though the owner (having insured the goods) declined to declare value in order to secure a lower rate from the forwarder, which thereby cannot declare value and must accept the vessel carrier's liability limits. Pet. Br. 39. First, respondents complain that extending COGSA to the railroad violates the public policy against exculpating a carrier from its negligence. They confuse apples and oranges; as this Court long ago held, liability limits accepted in return for lower rates are a form of liquidated damages and do not implicate the policy against exculpation from negligence. *Hart v. Pennsylvania R.R.*, 112 U.S. 331, 337-41 (1884). Second, respondents complain about the owner's risk of liability for a second freight charge if the forwarder defaults; but the vessel carrier has a lien against the owner's goods regardless, and respondents would have their remedy against the forwarder. Third, respondents complain that they might be liable for the negligence of the forwarder in shipping hazardous goods, Resp. Br. 31, but the doctrine that owners are bound by the contract of carriage has not been so extended. Even if it were, there would be no injustice; far better the loss should fall on the owner who entrusted

hazardous goods to a negligent forwarder than upon the innocent carrier. Last, whether the owner had knowledge of the vessel carrier's terms (see Resp. Br. 30, 49) is legally irrelevant under *Great Northern* and the filed rate doctrine, *Kansas City S. Ry.* v. *Carl*, 227 U.S. 639, 652 (1913). If this were a concern, Kirby should have either dealt with the vessel carrier itself, or required ICC to select only approved carriers. Having granted ICC unqualified authority to procure transportation from a vessel carrier, it cannot complain now.

6. Even if the Hamburg Süd bill is unenforceable, NS is entitled to the liability limitations in ICC's contract with Kirby. Pet. Br. 40-49. Respondents would convert *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959), into a rule of contract nullification, arrogating to courts the power to override the contractual language to which the parties agreed and to determine when such language is "permissible." Resp. Br. 38 n.38. Nothing in *Herd* or any other case of this Court supports their position.

Respondents are unabashed in their claim that a court may disregard the plain contract language. They repudiate the rule that "[t]he principle of strict construction" does not permit courts to deny text its "natural significance," *Singer* v. *United States*, 323 U.S. 338, 341-42 (1945), as applicable only to criminal statutes. Resp. Br. 34. To the contrary, this Court has always emphasized that the rule of strict construction in *contracts* likewise applies only to resolve ambiguities, and does not empower courts to ignore "the sense and meaning of the terms which the parties have used," which, absent ambiguity, "are to be taken and understood in their plain, ordinary, and popular sense." *Imperial Fire Ins. Co.* v. *Coos County*, 151 U.S. 452, 463 (1894). More specifically, this Court has long held that clauses limiting liability in bills of lading must be given their "fair and reasonable meaning," with resort to strict construction necessary only if the clause is ambiguous. *Texas & Pac. Ry.* v. *Reiss*, 183 U.S. 621, 626,

629 (1902). This is the rule followed in *Herd*. Pet. Br. 41-42.[9]

Respondents make no argument regarding the plain language of the ICC Himalaya clause. That clause extends the bill's liability limits not only to the carrier's servants and

[9] Respondents evince a misunderstanding of *Herd* in arguing that Norfolk Southern improperly "transformed" the question presented of maritime law into one of "contract interpretation." Resp. Br. 37 n.36. There is no transformation; *Herd* is a federal maritime rule of contract interpretation (no different from the common law rule), 359 U.S. at 305, but one that can only be invoked to resolve contractual ambiguities, not to override the contract. Moreover, the reference in the petition's question presented to whether "federal maritime law requires" a privity rule simply reflects the Eleventh Circuit's holding that "[i]n this Circuit . . . the law requires privity between the carrier and the party seeking shelter in the Himalaya clause." Pet. App. 13a-14a. Respondent's further claim that the "any other person" language in the ICC Himalaya Clause was not raised in the petition and is not before this Court, Br. 37-38, is a flat misstatement. The petition expressly argued that "[t]he plain language of the FBL refutes the Eleventh Circuit's implausible construction of the Himalaya clause, and underscores the impropriety of its privity-of-contract rule. First, the Himalaya clause in Clause 10.1 of the ICC bill by its terms extends liability to 'any servant, agent *or other person (including any independent contractor) whose services have been used in order to perform the contract*.' Pet. App. 59a (ICC ¶ 10.1)." Pet. 27 (emphasis in the petition). Not only was this point argued, but plain contract meaning is "fairly included" within and "predicate to an intelligent resolution of" the question presented regarding the *Herd* rule of contract construction. Sup. Ct. R. 14.1; *Vance* v. *Terrazas*, 444 U.S. 252, 258-59 n. 5 (1980).

Respondents also renew their (meritless) argument that the Eleventh Circuit's declaration that *Herd* requires express references to "inland carriers" in Himalaya clauses is outside the question presented and precludes review of that question as an independent basis for the judgment. Resp. Br. 42 That same contention was raised in the opposition (Opp. 24-25) and refuted in the reply brief (Pet. Reply 9 & n.7). Because the argument was raised in the opposition, "[i]n granting certiorari, [this Court] necessarily considered and rejected that contention as a basis for denying review." *United States* v. *Williams*, 504 U.S. 36, 40 (1992). In all events, the Eleventh Circuit's misguided "inland carrier" rule only has conceivable relevance to this case if *Herd* permits a court to nullify the contractual language used by the parties, which it does not.

agents, but to "*any* . . . other person (including *any* independent contractor) whose services have been used in order to perform the contract." JA 94 (¶ 10.1) (emphasis added). Respondents do not deny that NS, which carried the goods inland to Huntsville, is a person "whose services have been used in order to perform the contract" for multimodal transportation both by sea and land of the goods to Huntsville. Pet. Br. 43. Indeed, respondents attempt no construction – strict or otherwise – of this contractual language. Like the Eleventh Circuit, respondents claim that this language must be nullified (not strictly construed) because allegedly it lacks "clarity." Resp. Br. 35-36. But no court may "rewrite [the parties'] contract while purporting to interpret or construe it." 11 R. Lord, *Williston on Contracts* § 31:5, at 299 (4th ed. 1999). The Eleventh Circuit had no writ to expunge this language to "leave[], then, a Himalaya clause that extends to 'any servant, agent, or . . . any independent contractors.'" Pet. App. 12a. Courts applying strict construction rules "may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made." *Imperial Fire Ins. Co.*, 151 U.S. at 462.

The Eleventh Circuit's interpretation also cannot be squared with the rule that a contract is read as a whole. *Williston*, § 32:5. "[W]hen the same word or phrase is used in different parts of the contract, it will be presumed to be used in the same sense throughout; and where its meaning in one instance is clear, that meaning will be attached to it elsewhere in the contract." *Schweigert* v. *Beneficial Standard Life Ins. Co.*, 282 P.2d 621, 626 (Or. 1955). The initial brief demonstrated that the Eleventh Circuit's interpretation of Clause 10.1 must be rejected because Clause 2.2 uses substantively identical language in defining the *freight forwarder's* liability, and under that construction ICC would have succeeded in immunizing itself *totally* for liability for loss for part or all of the door-to-door multimodal contract of carriage (depending on whether its "independent contractor in

privity" Hamburg Süd chartered or subcontracted the ocean as well as the inland transport). Pet. Br. 44-45; U.S. Br. 14-16. Unable to bless this result, respondents tie themselves in knots with warring canons of construction. They advance the absurdity that the same contract language addressing liability will be broadly construed in one clause (2.2) to include railroads and every other service performer, marine or inland, but strictly construed in a neighboring clause (10.1) to mean only the initial vessel carrier with whom the forwarder directly contracts. Resp. Br. 34-35. But their concession that Clause 2.2 covers inland carriers concedes the case. Clause 10.4 of the ICC bill states that "[t]he aggregate of the amounts recoverable from the Freight Forwarder *and the persons referred to in Clauses 2.2 and 10.1* shall not exceed the limits provided for in these conditions." JA 94 (emphasis added).[10]

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

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[10] Even respondents' arguments that treat the ICC Himalaya Clause *as if* it only spoke of independent contractors are unsound. Drawing on cases involving ocean carriers' *ocean* bills of lading, they have no answer to the argument that a rule requiring privity and excluding inland carriers is nonsensical as applied to a multimodal, inland forwarder bill. Pet. Br. 48-49; U.S. Br. 14-19. Courts find Himalaya clauses to cover inland carriers even when not expressly designated therein. *See Caterpillar, Inc.* v. *Columbus Line, Inc.*, 19 F.3d 26 (9th Cir. 1994) (table), *available at* 1994 WL 59763, at **2; *Taisho Marine & Fire Ins. Co.* v. *Maersk Line, Inc.*, 796 F. Supp. 336, 342 (N.D. Ill. 1992), *aff'd*, 7 F.3d 238 (7th Cir. 1993) (table); *Aisin Seiki Co.* v. *Union Pac. R.R.*, 236 F. Supp. 2d 343, 347-48 (S.D.N.Y. 2002). Other courts reasonably compare the services the contractor performs to those the issuer undertakes. *Akiyama Corp. of Am.* v. *M.V. Hanjin Marseilles*, 162 F.3d 571, 574 (9th Cir. 1998). Moreover, respondents ironically contend that the term "'[i]ndependent contractors' covers only maritime parties such as stevedores and terminal operators," Resp. Br. 42, even though the rule they favor excludes such parties. Pet. Br. 46-47 & n.16. Finally, respondents err in invoking canons relevant to exculpatory clauses, Br. 34, which do not apply to rate-based liability limitations. *See infra* at 16.

Respectfully submitted,

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In the Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY, PETITIONER

v.

JAMES N. KIRBY, PTY LTD., DBA KIRBY ENGINEERING, AND ALLIANZ AUSTRALIA LIMITED

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

This brief is submitted in response to the Court's order of September 24, 2004, which invited the Acting Solicitor General to file a brief on behalf of the United States to address the following question: "Does federal or state substantive law govern the questions presented?" For the reasons set forth below, the position of the United States is that the questions presented by this case are issues of federal law.

As a threshold matter, however, we submit that the Court need not definitively resolve whether federal or state law generally would apply to questions of this type. As we explained in our brief at the petition stage (at 12-13), the parties litigated this case in the courts below on the clear (albeit implicit) premise that federal maritime law applies, and the court of appeals decided the case on that premise. Having prevailed on that theory below, respondents are in no position to deny the federal nature of the questions

presented. *New Hampshire* v. *Maine*, 532 U.S. 742, 749-750 (2001). The question whether federal law governs this case was raised at the petition stage by the United States (but not by respondents in their brief in opposition, see Sup. Ct. R. 15.2), and we stated that "this Court may rely on the parties' joint position and address the federal-law questions decided by the Eleventh Circuit and presented in the petition." U.S. Br. (Pet. Stage) 13. The Court chose to grant certiorari, and it should now proceed to decide the case in reliance on the parties' position that federal law governs.

I. THIS COURT SHOULD APPLY FEDERAL LAW IN CONSTRUING THE ICC/KIRBY BILL OF LADING

The court of appeals held that respondents' entitlement to damages was unaffected by the ICC/Kirby bill of lading because petitioner was not in privity of contract with ICC and is an inland rather than a maritime carrier. The correctness of that holding depends solely on the *interpretation* of the Himalaya Clause of the ICC/Kirby bill. For two reasons, this Court should apply federal law in construing that provision.

A. By Litigating This Question As One Of Federal Law In The Courts Below, Respondents Waived Any Argument That A Different Body Of Law Applies

1. In their supplemental brief at the petition stage of this case, respondents argued (at 1 n.1) that "Australian law undoubtedly governs the interpretation of the ICC[/Kirby] bill of lading." Respondents' conduct below, however, evinces a clear understanding that federal law would govern the interpretation of the ICC/Kirby bill's Himalaya Clause. Thus, in their Joint Motion requesting that the district court certify its partial summary judgment order for immediate appellate review, the parties explained (at 6) that a "substantial ground for a difference of opinion" existed in light of a "well-established conflict in authority between two of the leading maritime circuits"—the Second and the Fifth—

"with multiple decisions over several years in each circuit, on an issue that the Eleventh Circuit has never addressed." See Pet. App. 24a (describing Joint Motion). That motion's description of the various court of appeals decisions as presenting a common "issue," and its assertion of a circuit conflict, necessarily presupposed that each of the relevant Himalaya Clauses was governed by the same source of law.

Respondents' briefs in the court of appeals similarly assumed that the interpretation of the ICC/Kirby bill's Himalaya Clause was governed by federal law. Respondents relied on an array of federal cases, and they argued that the Eleventh Circuit's prior decision in *Hale Container Line, Inc.* v. *Houston Sea Packing Co.*, 137 F.3d 1455 (1998), "should have been dispositive on this question" (Resp. C.A. Br. 29). The suit in *Hale Container* was filed in admiralty (137 F.3d at 1464), however, and therefore was decided under the general maritime law. See, *e.g.*, *East River S.S. Corp.* v. *Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986) ("With admiralty jurisdiction comes the application of substantive admiralty law."). Respondents further argued that, in determining the effect of the ICC/Kirby bill's Himalaya Clause, the court of appeals "must choose between two competing lines of jurisprudence arising under [COGSA]" and "should be guided by which approach would better promote national and international uniformity." Resp. C.A. Br. 46. Neither respondents' opening brief nor their reply brief in the court of appeals cited any Georgia or Australian cases, analyzed Georgia or Australian law, or discussed Georgia choice-of-law principles. Compare Resp. Supp. Br. in Opp. 1 n.1. The court of appeals likewise decided the case on the apparent understanding that the general maritime law applied, since the court based its interpretive standard on its prior decision in *Hale Container* and, ultimately, on this Court's decision in *Robert C. Herd & Co.* v. *Krawill Mach. Corp.*, 359 U.S. 297 (1959). See Pet. App. 11a-12a.

2. Because the parties to this lawsuit agreed to treat the disputed issue of contract interpretation as one of federal law, this Court may decide the question on that understanding. When the "parties have agreed about what law governs, a federal court sitting in diversity is free, if it chooses, to forgo independent analysis and accept the parties' agreement." *Borden* v. *Paul Revere Life Ins. Co.*, 935 F.2d 370, 375 (1st Cir. 1991); accord, *e.g.*, *Texaco A/S (Denmark)* v. *Commercial Ins. Co.*, 160 F.3d 124, 128 (2d Cir. 1998); *Renick* v. *O.P.T.I.O.N. Care, Inc.*, 77 F.3d 309, 313 (9th Cir.), cert. denied, 519 U.S. 865 (1996); *Twohy* v. *First Nat'l Bank*, 758 F.2d 1185, 1190-1191 (7th Cir. 1985); see Restatement (Second) Conflict of Laws § 187 (Supp. 1988). That principle applies even when the parties' agreement as to the applicable law is implicit in their litigation conduct rather than expressly stated. See, *e.g.*, *Santalucia* v. *Sebright Transp., Inc.*, 232 F.3d 293, 296 (2d Cir. 2000) ("The parties' briefs assume that New York law controls this dispute, and such implied consent is sufficient to establish choice of law.") (ellipsis and internal quotation marks omitted). Cf. *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (holding that the respondent in that case, by failing to raise the argument in the courts below, had waived its contention that the suit was governed by federal maritime law rather than by state law).[1]

[1] Respondents' reliance (Supp. Br. in Opp. 1 n.1) on Clause 19 of the ICC/Kirby bill of lading is misplaced. Clause 19 states: "Actions against the Freight Forwarder may be instituted only in the place where the Freight Forwarder has his place of business * * *, and shall be decided according to the law of the country in which that place of business is situated." Pet. App. 67a; J.A. 98. By its terms, that Clause applies only to suits "against the Freight Forwarder," which in this case is ICC. And if Clause 19 did apply to this litigation, its effect would be to bar respondents' federal district court suit altogether.

B. Even If The Choice-Of-Law Issue Had Been Contested Below, Federal Law Would Govern The Interpretation Of The ICC/Kirby Bill Of Lading

1. "The bill of lading and the charter party are both maritime contracts and, hence, enforceable in a court of admiralty." *Armour & Co.* v. *Fort Morgan S.S. Co.*, 270 U.S. 253, 259 (1926). To be sure, this Court has rejected the proposition that "every term in every maritime contract can only be controlled by some federally defined admiralty rule." *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, 313 (1955). Nevertheless, concern for "the proper harmony and uniformity of [the general maritime] law in its international and interstate relations," *American Dredging Co.* v. *Miller*, 510 U.S. 443, 447 (1994) (quoting *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205, 216 (1917)), will typically support the application of federal maritime law to the construction of maritime contracts absent some strong countervailing state interest. See, *e.g.*, *Albany Ins. Co.* v. *Anh Thi Kieu*, 927 F.2d 882, 887 (5th Cir.) ("Federal maritime law properly controls any maritime dispute in the absence of a substantial and legitimate state interest."), cert. denied, 502 U.S. 901 (1991).[2]

The court of appeals held in this case that "relational" terms such as "agent," "servant," or "independent contractor," when used in the Himalaya Clause of an intermodal bill of lading issued by a transportation intermediary, should be construed to encompass only those who are in direct privity of contract with the intermediary. See Pet. App. 14a n.11. Under the court's analysis, even persons performing traditional maritime functions (*e.g.*, connecting ocean carriers, sailors, or stevedores) would be denied the protection of a

[2] The general maritime law is relevant here notwithstanding the fact (J.A. 31) that respondents brought this action as a diversity case. See *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 410-411 (1953); see also *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 222-223 (1986).

similarly-worded Himalaya Clause if they contracted with the vessel operator rather than with the intermediary. The question whether particular language in a maritime transportation contract will be deemed to cover such persons implicates substantial federal interests in uniformity and predictability and should therefore be decided by reference to the general maritime law. See *Robert C. Herd & Co.*, 359 U.S. at 308 (applying "the common law as declared by this Court"); *Wemhoener Pressen* v. *Ceres Marine Terminals, Inc.*, 5 F.3d 734, 740, 743 (4th Cir. 1993); but cf. *Colgate Palmolive Co.* v. *S/S Dart Canada*, 724 F.2d 313, 315-317 (2d Cir. 1983), cert. denied, 466 U.S. 963 (1984).

2. The question whether the ICC/Kirby bill's Himalaya Clause extends to inland carriers is of a somewhat different character. By its very nature, that issue could not arise in the interpretation of a purely maritime contract. The issue nevertheless implicates important federal interests that support the application of a uniform federal rule.

The purpose of multimodal shipping agreements, such as the standard FIATA bill of lading utilized in this case, is to allow cargo owners to arrange through a single contract for both the sea and land phases of the transportation. The efficacy of that integrated approach depends on consistent and predictable resolution of *all* disputes concerning the interpretation of the agreement, including those controversies that involve the land phase alone. The ability of an intermediary such as ICC to arrange for through transportation of goods from Sydney to Huntsville could be hindered if the potential exposure of inland subcontractors depended on the law (including the choice-of-law rules) of the particular State in which an accident might occur. See U.S. Br. (Pet. Stage) 9-11; World Shipping Council Br. 2-6.

A federal rule of decision may be appropriate "where there is a 'significant conflict between some federal policy or interest and the use of state law.'" *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 87 (1994) (quoting *Wallis* v. *Pan Am.*

Petroleum Corp., 384 U.S. 63, 68 (1966)); see, *e.g.*, *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456 (1957) (holding that the substantive law to be applied in suits alleging breach of a collective bargaining agreement in violation of 29 U.S.C. 185(a) "is federal law, which the courts must fashion from the policy of our national labor laws"). Even if the choice-of-law issue had been contested in the courts below, the foregoing considerations would justify the application of federal maritime law to resolve disputes concerning the application of Himalaya Clauses in multimodal transportation agreements to the land phase of the carriage. The argument in favor of applying federal law is particularly strong in the instant case, because the land phase of the contractual undertaking involved the *interstate* transportation of goods. See *Cincinnati, New Orleans & Tex. Pac. Ry.* v. *Rankin*, 241 U.S. 319, 326-327 (1916) (questions concerning the interpretation and effect of a railroad bill of lading for an interstate shipment are decided under federal law); Bills of Lading Act, 49 U.S.C. 80101 *et seq.*[3]

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[3] A number of lower courts have held that the federal admiralty courts ordinarily lack admiralty jurisdiction over breach-of-contract claims when the relevant contract is not "wholly maritime" but instead includes both maritime and non-maritime components, unless the maritime aspects are "separable" or the non-maritime aspects are "merely incidental." See, *e.g.*, *Sea-Land Serv., Inc.* v. *Danzig*, 211 F.3d 1373, 1378 (Fed. Cir. 2000); *Kuehne & Nagel* v. *Geosource, Inc.*, 874 F.2d 283, 290 (5th Cir. 1989); cf. *American Stevedores, Inc.* v. *Porello*, 330 U.S. 446, 456 (1947) (describing admiralty jurisdiction over mixed maritime and non-maritime contracts as "doubtful"). Whatever the validity *vel non* of the "wholly maritime" test in other settings, however, it would "interfere[] with the proper harmony and uniformity of [the general maritime] law in its international and interstate relations" (*American Dredging Co.*, 510 U.S. at 447) to subject Himalaya Clauses in international multimodal bills of lading to the potentially conflicting interpretive regimes of 50 state jurisdictions. In any event, there is no persuasive ground for applying non-federal law to the interpretation of a multimodal transportation contract when even the non-maritime component of the transportation involves an undertaking

Because respondents implicitly consented to the court of appeals' application of federal law in construing the ICC/Kirby bill of lading, however, the Court need not decide what law would have governed if the choice-of-law question had been disputed.

II. THE QUESTION WHETHER THE SHIPPING ACT PREEMPTS A STATE-LAW DAMAGES AWARD IN EXCESS OF THE LIMIT SPECIFIED IN THE HAMBURG SUD/ICC BILL OF LADING IS A QUESTION OF FEDERAL LAW

Respondents do not dispute that the Hamburg Sud/ICC bill established a $500-per-package limit that extended to the inland phase of the transportation. They contend, however, that they were not parties to that contract, and that their potential entitlement to damages under state tort law is therefore unaffected by the liability limit specified in the Hamburg Sud/ICC bill.

Our principal brief argues (at 22-26) that any state-law damages award in this case in excess of $500 per package is preempted because it "stands as an obstacle to the accomplishment and execution" (*Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 873 (2000) (citation omitted)) of Congress's purposes in enacting the Shipping Act of 1984, 46 U.S.C. App. 1701 *et seq.* Maritime common carriers like Hamburg Sud are required by the Shipping Act to maintain published tariffs that cover "any through transportation route that has been established" and that include sample copies of "any bill of lading * * * evidencing the transportation agreement." 46 U.S.C. App. 1707(a)(1) and (a)(1)(E); see 46 C.F.R. Pt. 520. Such carriers are forbidden by the Act to engage in unreasonable discrimination, including discrimination between

—interstate rail carriage—whose conduct and contracts have historically been governed by federal law.

non-vessel-owning common carriers (NVOCCs) and shipper-owners. See 46 U.S.C. App. 1709; U.S. Br. 24-25.

As a matter of longstanding and consistent industry practice, carriers' published tariffs have offered shippers a choice of carriage rates, depending on the shipper's decision whether to declare the full value of the goods or to accept a limitation of the carrier's potential liability. See U.S. Br. 3 & n.2, 22-23.[4] The rule announced by the court of appeals would substantially disrupt that regime by precluding the carrier from effectively limiting its potential exposure and that of its subcontractors when carrying freight shipped by an NVOCC.

Like any other issue concerning the meaning or legal effect of an Act of Congress, the question whether the Shipping Act's tariff regime and non-discrimination principle preclude respondents' attempt to avoid the liability limits set forth in the Hamburg Sud bill of lading presents an issue of federal law. See, *e.g.*, *AT&T Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 221-228 (1998); *Southern Ry.* v. *Prescott*, 240 U.S. 632, 638-640 (1916) (where "the conditions of liability * * * are stipulated in the bill of lading under the filed regulations, the conditions thus fixed are controlling" as a matter of federal law). To be sure, a claim of preemption could not itself have provided the basis for district court *jurisdiction* under 28 U.S.C. 1331. See, *e.g.*, *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 13-14 (1983). But where (as here) federal jurisdiction is clearly present on other grounds, the determination whether respondents' claims are preempted by the tariff regime and anti-discrimination principle embodied in the Shipping Act

[4] Thus, Hamburg Sud's bill of lading, which was incorporated into its tariff (46 U.S.C. App. 1707(a)(1)(E)), expressly set forth the limitation of liability terms applicable at standard freight rates and noted the shipper's right to declare a higher value upon payment of any additional required freight charge. J.A. 73 ¶ 17.

presents a federal question. And because that question is "so integral to decision of the case that [it] could be considered 'fairly subsumed' by the actual questions presented," *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526, 540 (1999) (citation omitted), this Court should consider the preemptive effect of the Shipping Act if it addresses the first question presented in the petition.

* * * * *

For the reasons stated above, and in our principal brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

OCTOBER 2004

APPENDIX

1. 46 U.S.C. App. 1701 provides:

Declaration of policy

The purposes of this chapter are—

(1) to establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs;

(2) to provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices;

(3) to encourage the development of an economically sound and efficient United States-flag liner fleet capable of meeting national security needs; and

(4) to promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.

2. 46 U.S.C. App. 1702 provides in pertinent part:

Definitions

As used in this chapter—

* * * * *

(6) "common carrier" means a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that—

(A) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and

(B) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country * * *.

* * * * *

(16) "ocean common carrier" means a vessel-operating common carrier.

(17) "ocean transportation intermediary" means an ocean freight forwarder or a non-vessel-operating common carrier. For purposes of this paragraph, the term—

(A) "ocean freight forwarder" means a person that—

(i) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and

(ii) processes the documentation or performs related activities incident to those shipments; and

(B) "non-vessel-operating common carrier" means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

* * * * *

(21) "shipper" means—

(A) a cargo owner;

(B) the person for whose account the ocean transportation is provided;

(C) the person to whom delivery is to be made;

(D) a shippers' association; or

(E) an ocean transportation intermediary, as defined in paragraph(17)(B) of this section, that accepts responsibility for payment of all charges applicable under the tariff or service contract.

* * * * *

3. 46 U.S.C. App. 1707 provides in pertinent part:

Tariffs

(a) In general

(1) Except with regard to bulk cargo, forest products, recycled metal scrap, new assembled motor vehicles, waste paper, and paper waste, each common carrier and conference shall keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established. However, common carriers shall not be required to state separately or otherwise reveal in tariffs the inland divisions of a through rate. Tariffs shall—

(A) state the places between which cargo will be carried;

(B) list each classification of cargo in use;

* * * * *

(D) state separately each terminal or other charge, privilege, or facility under the control of the carrier or conference and any rules or regulations that in any way change, affect, or determine any part or the aggregate of the rates or charges;

(E) include sample copies of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement;

* * * * *

(2) Tariffs shall be made available electronically to any person, without time, quantity, or other limitation, through appropriate access from remote locations, and a reasonable charge may be assessed for such access. No charge may be assessed a Federal agency for such access.

* * * * *

4. 46 U.S.C. App. 1709 provides in pertinent part:

Prohibited acts

(a) In general

No person may—

(1) knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise be applicable;

* * * * *

(b) Common carriers

No common carrier, either alone or in conjunction with any other person, directly or indirectly, may—

(1) allow any person to obtain transportation for property at less than the rates or charges established by the carrier in its tariff or service contract by means of false billing, false classification, false weighing, false measurement, or by any other unjust or unfair device or means;

(2) provide service in the liner trade that—

(A) is not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under section 1707 of this Appendix unless excepted or exempted under section 1707(a)(1) or 1715 of this Appendix; or

(B) is under a tariff or service contract which has been suspended or prohibited by the Commission under section 1708 of this Appendix or the Foreign Shipping Practices Act of 1988 (46 U.S.C. App. 1710a);

(3) retaliate against any shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason;

(4) for service pursuant to a tariff, engage in any unfair or unjustly discriminatory practice in the matter of—

(A) rates or charges;

(B) cargo classifications;

(C) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage;

(D) the loading and landing of freight; or

(E) the adjustment and settlement of claims;

* * * * *

(8) for service pursuant to a tariff, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage;

* * * * *

(10) unreasonably refuse to deal or negotiate[.]

* * * * *

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No. 02-1028

IN THE
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY LIMITED D/B/A KIRBY ENGINEERING AND ALLIANZ AUSTRALIA LIMITED,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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October 4, 2004

QUESTION PRESENTED

Pursuant to the Court's September 24, 2004 order requesting supplemental briefing, the parties have been asked to address the following additional question:

Does federal or state substantive law govern the questions presented?

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

At the heart of this case is a state-law tort suit. The portion of the case before the Court – NS's asserted contractual defense – presents questions of Australian law about the proper interpretation of the ICC bill of lading. Because the accident occurred on land, not at sea, there is no basis to apply general maritime law or COGSA to interpret the relevant provisions of the bill of lading. And there is no justification to apply federal common law or any other federal statute.

The parties did not stress the choice-of-law issue below because both questions are governed by contract interpretation principles (*see* Opp. i, 1; Resp. Cert. Supp. Br. 1 n.1, 10) that are generally applicable throughout the common-law world. First, whether ICC acted as Kirby's agent to conclude a second contract of carriage with Hamburg Süd depends primarily on the intent of ICC and Kirby as expressed in their contract, which is evidenced by the ICC bill of lading.[1] Second, whether NS is a third-party beneficiary under the ICC bill's Himalaya clause also depends primarily on the intent expressed in that same contract.[2] Because the court of appeals was obliged

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[1] In the court below, Kirby argued the first question as a matter of contract interpretation, relying on the terms of the ICC bill of lading and on secondary sources to show the parties' intent. *See* Kirby CA11 Br. 16-24. "Norfolk Southern's main argument to the contrary," Pet. App. 10a n.9, was based on the Shipping Act. Recognizing that ICC was *either* a principal (carrier) *or* an agent, NS argued that it was an agent because it did not qualify as a "carrier" under the Shipping Act. *See* NS CA11 Br. 25-29. NS has "now abandoned" that argument, NS Cert. Supp. Br. 9 n.4; *see also* NS Cert. Reply Br. 5-6 n.4 ("not renewed here"). NS did not advocate the simultaneous-carrier-and-agent theory based on maritime law (or perhaps federal common law) that it now asserts.

[2] The parties and their amici argue the second question as a matter of contract interpretation. In the petition, NS asserted that question 2 raised an issue of "federal maritime law." Pet. i. Once certiorari was granted, however, NS abandoned that assertion and returned to the contract interpretation argument. *See* NS Br. i; Resp. Br. 37 n.36.

to resolve those questions of contract interpretation regardless of what law applied – state, federal, or foreign – and Kirby properly prevails under any of those sources of law, there was no "colorable reason even to consider foreign law" in the courts below, as NS concedes. NS Cert. Supp. Br. 4.[3]

I. Alabama and Australian law properly govern the questions presented

In this diversity suit filed in Georgia, federal courts must follow Georgia's choice-of-law rule. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Georgia follows the traditional *lex loci delicti* rule, meaning the underlying tort claim is governed by the substantive law of the place where the tort occurred.[4] *See, e.g., Georgia Farm Bureau Mut. Ins. Co. v. Williams*, 266 Ga. App. 540, 541

Kirby has relied heavily on *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959), and its progeny for principles of contract interpretation. These principles are similarly expressed in decisions throughout the common-law world. *Cf.* Resp. Br. 35 n.32, 39 (citing *The Starsin*, [2003] UKHL 12). Indeed, the *Herd* Court itself discussed English and Australian cases, relying particularly on *Wilson v. Darling Island Stevedoring & Lighterage Co.*, 95 C.L.R. 43 (Austl. 1956), to preserve the uniformity of approach in these matters. *See* 359 U.S. at 306-08. Because both the *Herd* contract (a port-to-port bill of lading) and the incident (dropping cargo into Baltimore harbor) were within the admiralty jurisdiction, the Court applied general maritime law as the substantive rule of decision. *Cf.* pp. 4-5, *infra*.

[3] Respondents informed the Court at the certiorari stage that Australian law properly governs the central issues of contract interpretation. *See* Resp. Cert. Supp. Br. 1 & n.1, 10; *see also* Opp. 30 ("question necessarily involves an analysis of the Australian contracting parties' intent – not an issue of federal law"). In *Green Fire & Marine Insurance Co. v. M/V Hyundai Liberty* (No. 02-813), which came to conference on the same day as this case, the petitioner there also stressed the applicability of Australian law here, *see Green Fire* Pet. Supp. Br. at 3 (Dec. 10, 2003), and the absence of any federal law, *see id.* at 3-7.

[4] The Georgia Supreme Court recognizes a "public policy exception to the rule of *lex loci delicti*," under which state substantive law would override foreign law if necessary to protect state policy. *Alexander v. General Motors Corp.*, 267 Ga. 339, 340, 478 S.E.2d 123, 123-24 (1996).

n.4, 597 S.E.2d 430, 431 n.4 (2004). The train derailment underlying Kirby's tort claim occurred in Alabama. Thus, Alabama's substantive law governs that claim.

Both questions presented arise out of NS's asserted defense based on its claim to be a third-party beneficiary of contracts concluded in Australia.[5] Both Georgia and Alabama follow the traditional *lex loci contractus* rule, meaning that the law of the place in which the contract was concluded governs the interpretation of a contract. *See, e.g., Stovall v. Universal Constr. Co.*, Nos. 1021938 & 1021953, 2004 WL 1233970, at *9 (Ala. June 9, 2004); *Convergys Corp. v. Keener*, 276 Ga. 808, 582 S.E.2d 84 (2003). Thus, Australian law governs the contract interpretation issues.

Once the contract is properly interpreted under Australian law, state substantive law ultimately determines the extent to which the defense is recognized. *Cf.* n.4, *supra*. Under no tenable theory is NS's contract-based defense governed by federal substantive law.

II. The general maritime law does not apply in this case

NS has asserted that maritime law applies. *See, e.g.*, Pet. i, 1, 2, 5; NS Cert. Reply Br. 1-2. But maritime law cannot provide the substantive rule of decision here because there is no basis for admiralty jurisdiction.

As this Court explained in *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 204 (1971), "[w]hether federal maritime law govern[s] [an] accident . . . depends on whether [the case is] within the admiralty and maritime jurisdiction conferred on the district courts by the Constitution and the jurisdictional statutes." The Court there held that "federal

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[5] The ICC bill of lading is the only contract requiring interpretation under the questions presented. Question 1 addresses whether the Hamburg Süd bill of lading binds Kirby, but the actual interpretation of that bill is not a question presented to this Court. In any event, the Hamburg Süd bill of lading was also concluded in Australia.

maritime law does not govern this accident" because there was no admiralty jurisdiction. *Id.*[6]

That rule is constitutionally mandated. Without admiralty jurisdiction, there is no "congressional authorization [for the federal courts] to formulate substantive rules of decision." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Admiralty jurisdiction, in turn, exists either when a case is properly filed "in admiralty" (*i.e.*, the plaintiff asserts jurisdiction under 28 U.S.C. § 1333) or when the case could have been filed in admiralty (*i.e.*, the plaintiff could have asserted jurisdiction under § 1333 but chose instead to sue in state court or in federal court under 28 U.S.C. § 1331 or § 1332). Because Kirby brought its action in diversity and could not have sued in admiralty, there is no admiralty jurisdiction here.

There is no basis for admiralty tort jurisdiction because the "location" of the tort was not on "navigable waters" and NS's activities giving rise to tort liability did not have a "substantial relationship" to "traditional maritime activity." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 533-34 (1995) (internal quotation marks omitted); *Sisson v. Ruby*, 497 U.S. 358, 363-64 (1990); *see also Victory Carriers*, 404 U.S. at 203-04 (holding that there is no admiralty jurisdiction over an accident on a pier because it did not occur on navigable waters). The Admiralty Extension Act, 46 U.S.C. app. § 740, which broadens the locality test, is irrelevant because the train derailment was not "caused by a vessel on navigable water." *Cf. Victory Carriers*, 404 U.S. at 209-10.

Nor does the ICC bill of lading fall within admiralty contract jurisdiction. The ICC bill evidences a "mixed contract" containing maritime and non-maritime elements. Admiralty contract jurisdiction "is limited to contracts, claims, and services *purely maritime*." *Rea v. The Eclipse*, 135 U.S. 599, 608 (1890) (emphasis added). A "mixed contract" is not within the admiralty jurisdiction because it is not "wholly maritime." *See* Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 1-10, at 28 & n.95 (2d ed. 1975); Steven F. Friedell, 1 *Benedict on Admiralty* § 183 (7th rev. ed. 2003).

The lower courts uniformly enforce the mixed contract doctrine to deny admiralty jurisdiction over multimodal through bills of lading.[7] Although they have recognized an exception to the rule when the maritime and non-maritime elements of a mixed contract are separable, *see* cases cited n.7, the exception would not help NS (even if the elements were separable) because the non-maritime element of the contract is at issue here. Nor would admiralty jurisdiction exist on the theory that the non-maritime element of the contract is merely "incidental" to the maritime element. *See* cases cited n.7. Here, the inland transportation was not merely incidental, but – as NS repeatedly asserts with its emphasis on "through" carriage – a significant and fundamental part of the contract.

III. No federal maritime statute applies

NS has striven mightily to convey the impression that this case involves COGSA. The Act is mentioned on virtually every page of the petition. NS's merits brief declares

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[6] *See also, e.g., Kossick v. United Fruit Co.*, 365 U.S. 731, 735-38 (1961) (concluding, as a prerequisite to applying general maritime law, that the claim raised in a diversity case was within admiralty contract jurisdiction); *Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd.*, 230 F.3d 549, 556 (CA2 2000) ("In the absence of admiralty jurisdiction, this [multimodal carriage] case is governed, under diversity jurisdiction, by applicable state choice-of-law rules.").

[7] *See, e.g., Hartford Fire Ins.*, 230 F.3d at 555-56 (no admiralty jurisdiction in a multimodal carriage case involving truck, rail, and sea carriage because the contract was not "'purely' or 'wholly' maritime in nature"); *Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105, 109 (CA2 1997) (rail and sea); *Berkshire Fashions, Inc. v. M.V. Hakusan II*, 954 F.2d 874, 880-81 (CA3 1992) (sea and rail); *Kuehne & Nagel (Ag & Co) v. Geosource, Inc.*, 874 F.2d 283, 290 (CA5 1989) (sea and truck); *JVC Americas Corp. v. CSX Intermodal Inc.*, 292 F. Supp. 2d 586, 591 (D.N.J. 2003) (sea and rail); *Coleman Co. v. Compagnie Generale Maritime*, 903 F. Supp. 45, 48 (S.D. Ga. 1995) (rail and sea).

that "it is by force of COGSA that federal law provides the rule of decision in determining liability under carrier bills of lading." NS Br. 7. In truth, this case does not implicate COGSA in any way.[8]

Even NS admits that COGSA does not apply of its own force. *See* NS Br. 9. By its terms, COGSA applies only during the so-called "tackle-to-tackle" period. *See* COGSA § 1(e), 46 U.S.C. app. § 1301(e) (limiting coverage to "the period from the time when the goods are loaded on to the time when they are discharged from the ship"). COGSA thus applies only during the ocean voyage, not during any inland carriage. Indeed, COGSA explicitly disclaims any preemption of state law after the goods are discharged:

> Nothing in this Act shall be construed as superseding any part of [the Harter Act, 46 U.S.C. app. §§ 190-196], *or of any other law which would be applicable in the absence of this Act*, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

Id. § 12, 46 U.S.C. app. § 1311 (emphasis added). To the extent that state or foreign law applies to inland carriage in the absence of COGSA, therefore, it continues to apply notwithstanding COGSA.

Although bills of lading often extend COGSA to govern periods before loading and after discharge,[9] this contractual extension is effective only as a matter of contract. *See, e.g., Indemnity Ins. Co. of N. Am. v. Hanjin Shipping Co.*, 348 F.3d 628, 635 (CA7 2003); *Colgate Palmolive Co. v. S/S Dart Canada*, 724 F.2d 313, 315 (CA2 1983). COGSA has no power to preempt state law except to the extent that it applies as a federal statute. The parties may not avoid the application of controlling state law simply by incorporating the terms of a federal statute into their private agreement.[10]

In any event, the ICC bill of lading does not even attempt to extend COGSA to govern inland transportation. Clause 7.3 calls for the application of COGSA *only* when

[8] The district court held various state-law claims preempted by COGSA. Pet. App. 37a. That holding is erroneous, but respondents did not challenge it on interlocutory appeal because the separate limitation of liability issue raised "a controlling question of law" the resolution of which would "materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b). Even if COGSA were applicable, NS would still have no basis to assert any limitation because it is not the beneficiary of a Himalaya clause that is binding on Kirby.

[9] NS's reliance on COGSA § 7, 46 U.S.C. app. § 1307, *see, e.g.*, NS Reply Br. 5, is misplaced. Section 7 provides that "[n]othing contained in this Act shall *prevent* a carrier or a shipper from entering into any agreement" regarding liability prior to loading or after discharge. 46 U.S.C. app. § 1307 (emphasis added). Section 7 thus is a savings clause that ensures that COGSA does not govern contractual dealings that apply outside the tackle-to-tackle period. *See* 1 *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules* 312 (M. Sturley ed. 1990). It would be ironic indeed if a savings provision designed to exclude the statute were construed to expand the preemptive reach of federal law.

[10] The Fourth Circuit has declared "that contractual incorporations of COGSA into foreign bills of lading should be construed according to federal law." *Wemhoener Pressen v. Ceres Marine Terminals, Inc.*, 5 F.3d 734, 740 (CA4 1993). This statement, however, was limited to the period when "the bill of lading is still governed by COGSA or the Harter Act." *Id.* In other words, the court declared that federal law supplies the rule of decision only when a federal statute (COGSA or the Harter Act) already governs. (This limitation is confirmed by the fact that all five of the decisions on which the court relied, *see id.* at 740-41, were also cases in which the Harter Act governed at the relevant time.) Moreover, the court justified its conclusion by noting the existence of admiralty jurisdiction. *Id.* at 740. Neither admiralty jurisdiction (*see* pp. 4-5, *supra*) nor the application of COGSA (*see* pp. 5-6, *supra*) or the Harter Act (*see* p.8, *infra*) is present in this case. In any event, *Wemhoener Pressen* is irrelevant here because the ICC bill of lading does not purport to extend COGSA inland. *See* pp. 7-8, *infra*.

In the absence of admiralty jurisdiction or the mandatory application of COGSA or the Harter Act, state law does apply. The lower courts have consistently recognized this, from Judge Friendly's seminal opinion for the Second Circuit in *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 807-08 (CA2 1971), to Judge Wood's opinion for the Seventh Circuit last year in *Indemnity Insurance*, 348 F.3d at 633.

the statute is "compulsorily applicable to this FBL or would be applicable but for the goods being carried on deck in accordance with a statement on this FBL." JA 91. COGSA was not "compulsorily applicable" during inland carriage that took place after "the time when the goods . . . [we]re discharged from the ship." COGSA § 1(e), 46 U.S.C. app. § 1301(e). The fact that clause 7.3 deals specifically with deck carriage (otherwise excluded under COGSA § 1(c), 46 U.S.C. app. § 1301(c)), but makes no effort to alter the tackle-to-tackle limitation, is highly significant. The inference is unmistakable: The parties wanted COGSA to cover deck carriage but not inland carriage.

COGSA does not apply in this case for one more reason. The Act was passed to regulate the relationship between a carrier (ICC in this case) and a shipper (Kirby). It does not regulate a shipper's claim against a third party (such as NS). Just as the *Herd* Court found the Act irrelevant to the shipper's claim against the stevedore because it was not a COGSA carrier, so too COGSA is irrelevant to Kirby's claim against NS. Third parties outside of the § 1(a) "carrier" definition may be contractually protected by clear Himalaya clauses in appropriate circumstances, but they are never covered by COGSA itself.

NS has not claimed that the Harter Act provides the substantive law here, but that statute also does not extend to inland carriage. *See, e.g., Mannesman Demag Corp. v. M/V Concert Express*, 225 F.3d 587, 593-95 (CA5 2000); *Sony Computer Entm't Inc. v. Nippon Express U.S.A. (Illinios), Inc.*, 313 F. Supp. 2d 333, 337 (S.D.N.Y. 2004). The plain language of the statute, which governs "vessels" and related entities (rather than "carriers"), confirms this uniform jurisprudence. *See* Harter Act §§ 1-4, 46 U.S.C. app. §§ 190-193.

IV. No other federal law applies

No other federal statute or principle of federal "common law" governs the questions presented. The one federal

statute that might plausibly apply is the Carmack Amendment. *See* U.S. Cert. Br. 11-12. But NS concedes that "there is no Carmack issue in this case," NS Cert. Supp. Br. 2, and no provision of the Carmack Amendment addresses a railroad's purported defenses arising under a multimodal bill of lading to which it is not a party. The Federal Bill of Lading ("Pomerene") Act, 49 U.S.C. §§ 80101-80116, does not govern bills of lading for transportation *from* a foreign country *to* a place in a State. *Cf. id.* § 80102(5) (covering bills of lading for transportation "*from* a place in a State *to* a place in a foreign country") (emphases added).[11] Nor does the Shipping Act govern, as NS has conceded. *See* NS Cert. Supp. Br. 9 n.4 (Court can decide case "without any resort to analysis of the Shipping Act (which is not directly at issue)").

Finally, federal common law does not apply. Our merits brief (at 24-26) explains why federal common law does not support NS's novel defense of "carrier-agency."[12] Even NS

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[11] The Pomerene Act's coverage of outbound but not inbound bills of lading reflects Congress's acceptance of the international understanding that bills of lading should generally be governed by the law of the place of shipment. NS's past reliance (NS Cert. Supp. Br. 5) on *Cincinnati, New Orleans, & Texas Pacific Railway v. Rankin*, 241 U.S. 319 (1916), is misplaced. That pre-*Erie* decision assumed the existence of "common-law rules" to fill in the interstices of "acts of Congress" such as the Pomerene Act that expressly govern interstate bills of lading. *Id.* at 326-27. *Rankin* did not address an inbound international shipment that would fall outside the scope of the Pomerene Act, so its references to "federal common law" – especially pre-*Erie* – are irrelevant here.

[12] In any event, the cases on which NS relies for its assertion of a rule of carrier-agency did not rest on federal common law. In *New Jersey Steam Navigation Co. v. Merchant's Bank of Boston*, 47 U.S. (6 How.) 344 (1848), the Court's decision rested on maritime law. *See id.* at 391-92. *Great Northern Railway v. O'Connor*, 232 U.S. 508 (1914), involved enforcement of a federally imposed and filed tariff – a *statutory* obligation – and not a "federal common law" principle. *Id.* at 515 ("so long as the tariff rate, based on value, remained operative, it was binding upon the shipper"). And *Chicago, Milwaukee, St. Paul & Pacific Railroad v. Acme Fast Freight, Inc.*, 336 U.S. 465, 489 (1949), involved a construction of the Freight Forwarder Act of 1942.

does not claim a federal common-law basis for its Himalaya clause assertions. Such a claim would also fail for essentially the same reasons.

Since *Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938), it has been well-recognized that, in the absence of "some congressional authorization to formulate substantive rules of decision," federal common law exists "only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Indus.*, 451 U.S. at 641 (footnotes omitted). NS's apparent view that federal common law applies is particularly implausible given the deregulation of the rail and ocean carriage industries, *see* Resp. Br. 26 n.24, and the express omission by Congress of statutory rules for bills of lading that govern shipments originating in foreign countries, *see* 49 U.S.C. § 80102. NS's assertion of a defense arising out of contract terms in both the ICC and Hamburg Süd bills of lading is thus precisely the type of "privately ordered obligation[]" this Court has held should be construed under state substantive law and not be deemed a "requirement" imposed by federal law. *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228-29, 232 (1995) ("[a] remedy confined to a contract's terms simply holds parties to their agreements" and does not give rise to "federal common law"); *see* Resp. Br. 26. Given Congress's decision *not* to regulate foreign-issued bills of lading, it would be anomalous to impose federal common-law rules that purport to regulate the conduct of foreign parties.

Conclusion

Federal diversity jurisdiction gives this Court the power to decide this case. The substantive rule of decision, however, rests on state law, as informed by Australian contract interpretation principles. The Court should affirm or dismiss the writ as improvidently granted.

Respectfully submitted,

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No. 02-1028

IN THE
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY PTY LTD D/B/A/ KIRBY ENGINEERING, MMI GENERAL INSURANCE, LTD.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF OF PETITIONER ON THE APPLICABILITY OF FEDERAL LAW

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QUESTIONS PRESENTED

Does federal or state substantive law govern the questions presented?

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SUPPLEMENTAL BRIEF

Federal law governs both questions presented. The first question is whether a contract for the transnational transportation of goods by sea into the United States entered into by a forwarder-carrier with the vessel carrier binds the cargo owner. The obligations created by maritime bills of lading have long been governed by federal maritime law, not state law. Moreover, both the Carriage of Goods By Sea Act (COGSA) and the Shipping Act compel the application of federal law. Finally, the parties litigated and the courts below decided this issue under federal law. Federal law likewise governs the second question presented, which concerns the application of the rule of *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959). The interpretation of a Himalaya Clause in a maritime bill of lading is a question of federal maritime law; the court of appeals expressly decided the question as a matter of federal law; and the parties litigated the issue as such. Application of the law of 50 states to these questions would destroy the necessary uniformity in the law governing maritime contracts of carriage.

1. A contract for carriage of goods by sea between a foreign country and the United States is a maritime contract, *Armour & Co.* v. *Ft. Morgan S.S. Co.*, 270 U.S. 253, 259 (1926); *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427 (1866); *Morewood v. Enequist*, 64 U.S. (23 How.) 491, 493 (1859), and is governed by maritime law. *Workman* v. *New York City*, 179 U.S. 552, 562 (1900). As this Court explained, federal maritime law is "'a system of law coextensive with, and operating uniformly in, the whole country,'" and it is contrary to the constitutional scheme "'to place the rules and limits of maritime law under the disposal and regulation of the several states.'" *Id.* at 561-62. Thus, "a maritime contract executed in New York [i]s held to be an American contract," and is governed by federal and not state law. *Id.* at 562; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.*, 129 U.S.

397, 458 (1889) (federal maritime law governed "the nature, the obligation and the interpretation" of the bill of lading)).

Accordingly, federal maritime law determines the obligations of maritime contracts. That includes special rules of implied agency in contracting that arise "from considerations of the convenience and necessities of the commercial world," regardless of principles of common-law agency. *Thomas* v. *Osborn*, 60 U.S. (19 How.) 22, 30 (1856) (shipowner is bound under maritime law to the extent of his interest in the vessel by contracts of affreightment and certain necessary contracts for supplies and repairs of a ship master who is not his agent "upon the principle that the general owner must be presumed to consent, when he lets the vessel, that the master may make such contracts"); *The Schooner Freeman*, 59 U.S. (18 How.) 182, 189-90 (1855); *The Aurora*, 14 U.S. (1 Wheat) 96, 102 (1816) (Even if not an agent for other matters, "[t]he master of the ship is the confidential servant or agent of the owners, and they are bound to the performance of all lawful contracts made by him, relative to the usual employment of the ship, and the repairs and other necessaries furnished for her use. This rule is established as well upon the implied assent of the owners, as with a view to the convenience of the commercial world.").

In *New Jersey Steam Navigation Co.* v. *Merchant's Bank*, 47 U.S. (6 How.) 344 (1848), this Court applied federal rules of agency to determine the rights of a cargo owner under a maritime contract of carriage. It held that a contract of carriage was maritime in nature, *id.* at 392, and that a vessel carrier's contract with a nonvessel carrier "was, in contemplation of law, a contract" between the vessel carrier and the cargo owner. *Id.* at 380. This is because the nonvessel carrier is "*considered in law the agent or servant of the owner*, and the possession of the agent is the possession of the owner." *Id.* (emphasis added). "[C]ourts of admiralty, when carrying into execution maritime contracts and liens, are not governed by the strict and technical rules of the

common law, and deal with them upon equitable principles, and with reference to the usages and necessities of trade." *4,885 Bags of Linseed*, 66 U.S. (1 Black) 108, 114 (1861).[1]

The applicability of substantive maritime law does not depend upon the admiralty jurisdiction of the federal courts, but arises from the nature of the maritime contract. See *Watts* v. *Camors*, 115 U.S. 353, 362 (1885) (rejecting application of state contract law to an ocean charter-party because the parties "must be presumed to look to the general maritime law of the two countries, and not to the local law of the state in which the contract is signed"); *Union Fish Co.* v. *Erickson*, 248 U.S. 308, 313 (1919) (rejecting application of state law to a maritime service contract because "[t]he maritime law controlled" and "the parties must be presumed to have had in contemplation the system of maritime law under which it was made"). A contract for carriage of goods by sea is the quintessential maritime contract. It does not fall within the limited category of contracts that are "'maritime and local,' in the sense that the application of state law would not disturb the uniformity of maritime law." *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 738 (1961) (citation omitted). That exception only applies to contracts with, at a minimum, "no direct relation to navigation." *Grant Smith-Porter Ship Co.* v.

[1] Indeed, there are many specialized principles of maritime law where the rights and obligations of cargo owners are determined by the contract of affreightment, regardless of who contracts for the shipment. *See, e.g., E.J. Dupont de Nemours & Co.* v. *Vance*, 60 U.S. (19 How.) 162, 169, 170 (1856) (noting that "the maxim that the ship is bound to the merchandise, and the merchandise to the ship, for the performance of the obligations created by the contract of affreightment, is a settled rule of our maritime law"); *The Maggie Hammond*, 76 U.S. (9 Wall.) 435, 450 (1869) ("the shipper, consignee, or owner of the cargo, contracts to pay the freight and charges, and to the fulfillment of their contract the cargo is pledged to the ship"); *Ralli* v. *Troop*, 157 U.S. 386, 397 (1895) (the jettisoning of cargo for the safety of the ship is done by "'the captain as agent, not for the shipowner alone, but also for the cargo owner, by which act he jettisons part of the cargo on the implied basis that contribution will be made by the ship and by the other owners of cargo'").

Rohde, 257 U.S. 469, 477 (1922); *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, 314-21 (1955) (applying local law to marine insurance contract executed in a state given pervasiveness of state insurance regulation, and absence of any rule of maritime law); *Kossick*, 365 U.S. at 742 (discussing *Wilburn*).

The uniform and predictable application of maritime law is essential to the commercial reliance on bills of lading. As leading scholars have observed, the terms of bills of lading are "fixed by institutional practice and locked firm in printed forms," and "the fact that judicial interpretations have accreted around these set clauses and phrases tends in turn to make doubly sure their continued use, for the maritime world grows to rely on continuance in settled interpretations, and to stabilize its documentary practice on that reliance." G. Gilmore & C. Black, Jr., *The Law of Admiralty* § 1-6, at 15-16 (2d ed. 1975). The laws of the 50 states cannot apply to the question of whether direct privity of contract is required in order for a vessel carrier's bill of lading to be enforced against the cargo owner: "the uniformity of rules governing such contracts may be destroyed by perhaps conflicting rules of the States." *Union Fish*, 248 U.S. at 314; *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 324 (1964) (noting specialized contract liability rules under federal maritime law); *Herd*, 359 U.S. at 301 (COGSA enacted to promote uniformity in bills of lading).

Nothing in *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938) affects this analysis. *Erie* does not speak to, much less change, the rule that substantive maritime law is not displaced or altered by state law. *Wilburn*, 348 U.S. at 314 ("States can no more override such judicial rules validly fashioned than they can override Acts of Congress"); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 222-23 (1986); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 243-46 (1942). Thus, maritime law, where applicable, governs even when (as here) the plaintiffs invoke the diversity jurisdiction of the federal

court, and not its admiralty jurisdiction. *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 411 (1953); *Kossick*, 365 U.S. at 731, 738-40; 1 T. Schoenbaum, *Admiralty and Maritime Law* § 5-1, at 179-80 & n.5 (4th ed. 2004).[2]

Indeed, state law has no operation even as to bills of lading executed within a state for transportation to other states or foreign countries; those provisions have long been exclusively governed by federal law. *Cincinnati, New Orleans, & Tex. Pac. Ry.* v. *Rankin*, 241 U.S. 319, 326-27 (1916); *Missouri Pac. R.R.* v. *Elmore & Stahl*, 377 U.S. 134, 137 (1964); *Herd*, 359 U.S. at 308; 49 U.S.C. § 80102 (Bill of Lading Act). Although the Bill of Lading Act does not address bills issued in foreign lands for transport *into* the United States, there is no conceivable basis for applying state law to maritime bills of lading executed abroad. Such bills "are governed by the general maritime law, considering relevant choice of law rules" as between foreign and federal maritime law. 1 Schoenbaum, *supra*, § 10-11, at 622. Here, the court of appeals applied federal law, and respondents never raised any claim that foreign law governed or conflicted with the federal rule that a cargo owner is bound by the contracts made for shipment of his goods by a forwarder-carrier. In any event, federal law necessarily provides the rule of decision here.

2. Even if there were a valid argument that state or foreign law would apply and support a different rule, COGSA and the Shipping Act compel the rule advocated by petitioner as a matter of federal law. COGSA is wholly nullified if the vessel carrier's contract of carriage in its bill of lading cannot

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[2] Plaintiff's claim for breach of contract is within the admiralty jurisdiction of the federal court, even though the complaint only expressly claimed diversity jurisdiction. JA 30-31, 37-38. Furthermore, this Court has rightly held that a provision of a bill of lading may not be defeated by the expedient of pleading one's claim in tort. *The Queen of the Pac.*, 180 U.S. 49, 53 (1901); *see Nippon Fire & Marine Ins. Co.* v. *Skyway Freight Sys., Ltd.*, 235 F.3d 53, 60 (2d Cir. 2000).

be enforced against the cargo owner. Pet. Br. 36-37; Reply Br. 4-5. COGSA only applies to "*contracts for carriage* of goods by sea to or from ports of the United States" manifest in bills of lading. 46 U.S.C. app. § 1312 (emphasis added); see also *id.* §§ 1300, 1302. It only "regulates the terms of ocean carriage by the indirect but highly efficacious device" of imposing statutory mandates as "compulsory terms" in the ocean carrier's bill of lading. Gilmore & Black, *supra*, § 3-25, at 145, § 3-38, at 172; 1 Schoenbaum, *supra*, § 10-15, at 650. Because COGSA only regulates contracts of carriage in bills of lading, both its mandatory and permissive provisions – including but not limited to its liability limitations – cannot be invoked against the cargo owner (the real party-in-interest) if the owner is not bound by the vessel carrier's bill of lading. Although respondents constantly emphasize that here a railroad is invoking the vessel carrier's bill, their proposed rule would prevent a vessel carrier from invoking the COGSA liability limit or other defenses against any claim of the cargo owner for losses at sea or on land. Thus, under respondents' rule, COGSA would have no effect because a cargo owner that uses a forwarder-carrier to contract with the vessel carrier could always evade COGSA by suing the vessel carrier directly. Federal law prohibits respondents' proposed rule because it nullifies COGSA. *Vimar Seguros y Reaseguros, S.A.* v. *M/V SKY REEFER*, 515 U.S. 528, 540-41 (1995); *Knott* v. *Botany Mills*, 179 U.S. 69, 77 (1900) (refusing to apply foreign law that would conflict with the Harter Act, the statutory precursor to COGSA); *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942) ("To the federal statute and policy, conflicting state law and policy must yield.").

Moreover, federal law governs here because the Shipping Act itself directly provides the rule of decision. A nonvessel-operating common carrier (NVOCC) such as ICC Ltd. in this case is expressly defined by the 1984 Shipping Act to be "a shipper in its relationship with an ocean common carrier." 46

U.S.C. app. § 1702(17)(B). Under longstanding federal law, a forwarder-carrier that contracts as a shipper with a transportation carrier acts as the agent for the cargo owner, its "undisclosed principal," and the owner is bound by the liability limitations accepted by the forwarder-carrier. *Chicago, Milwaukee, St. Paul & Pac. R.R.* v. *Acme Fast Freight, Inc.*, 336 U.S. 465, 488 n.27 (1949); *Great N. Ry.* v. *O'Connor*, 232 U.S. 508, 514 (1914); Pet. Br. 25-30; Reply Br. 7-8. Moreover, any contrary rule would violate the antidiscrimination mandate of the Shipping Act and the filed rate doctrine. Reply Br. at 12 & n.7. Federal law governs, and compels reversal on the first question presented.[3]

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[3] Even if there were an arguable basis for foreign maritime law to apply, which there is not, no party raised or demonstrated a different rule of foreign law below, and the district court and court of appeals decided the issue based on their understandings of the federal rule recognized by this Court in *Great Northern Railway* v. *O'Connor*, 232 U.S. 508 (1914), Pet. App. 7a, 37a. It is appropriate for federal courts to apply federal maritime law (the law of the forum regarding maritime bills of lading) when no party proves or raises an issue of foreign law. *Liverpool*, 129 U.S. at 444-46; Fed. R. Civ. P. 44.1 (a party seeking to invoke foreign law must give "reasonable written notice" of its intention to do so); *Restatement (Second) Conflict of Laws* § 136, cmt. h (1971) ("[w]hen both parties have failed to prove the foreign law, the forum may say that the parties have acquiesced in the application of the local law of the forum," and apply forum law); *Aceros Prefabricados, S.A.* v. *TradeArbed, Inc.*, 282 F.3d 92, 97 n.4 (2d Cir. 2002) ("The parties' briefs assume that New York substantive law governs the issues ... presented here, and such 'implied consent ... is sufficient to establish choice of law.'") (second omission in original); *American Fuel Corp.* v. *Utah Energy Dev. Co.*, 122 F.3d 130, 134 (2d Cir. 1997) (same). In any event, if conflicts-of-law analysis had been undertaken, federal law would have been the proper choice. While it is generally presumed that the law of the place of issuance governs, that rule does not apply if the "the parties at the time of making it have some other law in view," *Liverpool*, 129 U.S. at 458; *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 48 (1825), or if another jurisdiction has more significant interests in applying its law to the issue at hand, *Restatement* § 197. Here, the parties looked to federal law, making COGSA the default law governing the contract, JA 61 ("In the absence of compulsorily applicable legislation, COGSA shall govern."), and the

3. The second question presented of whether the *Herd* rule of strict construction may be invoked to deny the coverage of the ICC Himalaya Clause to Norfolk Southern is also plainly governed by federal law. *Herd* is a rule of federal law, 359 U.S. at 305-08 (applying federal "common law as declared by this Court" to Himalaya clause of ocean bill of lading for foreign transport), and the Eleventh Circuit was explicit that it was announcing a rule of federal law: "[i]n this Circuit . . . the law requires privity between the carrier and the party seeking shelter in the Himalaya clause." Pet. App. 13a-14a.

Moreover, just like the Hamburg Süd bill, the ICC bill of lading is a maritime contract executed abroad and governed by maritime law, and there is not even a colorable basis for application of any state's law, for all the reasons stated *supra* at 1-5. The ICC bill of lading likewise does not cease to be a maritime contract simply because the contract of carriage provides not just for ocean carriage but for door-to-door transportation from a foreign contrary to an inland destination in the United States, as the Shipping Act and COGSA encourage. Pet. Br. 3-4. Significantly, the Himalaya Clause at issue (Clause 10.1) applies to "any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract" at any stage of transportation. JA 94, and thus applies to maritime service providers (such as stevedores) as well as inland service providers.[4] The applicable law governing construction of a

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United States has the principal interest in the resolution of this issue, given the pervasive regulation of carrier liability by COGSA, the Harter Act, and the Shipping Act. *Restatement* § 197 & cmt. a ("the majority of claims in contract for damage to goods during interstate transportation or during international transportation to or from the United States by land, sea or air are governed by treaty or by federal law"); Gilmore & Black, *supra*, § 3-19 at 130. This Court should correct the Eleventh Circuit's erroneous interpretation of federal law.

[4] Respondents can hardly gainsay that this is a maritime contract, for they (erroneously) claim that the ICC Himalaya Clause only applies to maritime providers.

clause in a bill of lading does not vary depending on whether it is invoked by a maritime or inland service provider.

Furthermore, although COGSA does not by compulsory force apply to a carrier's servants, agents, or other service providers or beyond the tackle-to-tackle period, see *Herd*, 359 U.S. at 301-02, COGSA nonetheless affirmatively permits carriers to extend the COGSA limitations by contract. 46 U.S.C. app. § 1307. As the Fourth Circuit has held,

> By subjecting all foreign bills of lading to COGSA, Congress afforded to international shippers and carriers a greater degree of certainty and uniformity in their dealings. And, by permitting those parties to contractually extend application of COGSA to the periods prior to loading and after unloading but before delivery, Congress authorized shippers and carriers to place all of their dealings under COGSA, if they so intend. To hold that this contractual extension of COGSA, to which both shipper and carrier have agreed, may be measured against the state law of the port in which the cargo may be damaged could undercut these protections and would offer to sellers and shippers the benefit of additional legal theories and remedies for which they had not bargained.

Wemhoener Pressen v. *Ceres Marine Terminals, Inc.*, 5 F.3d 734, 741 (4th Cir. 1993). Moreover, "the contract of carriage embodied by the bill represents the parties' intentions at the time the contract was made. So long as it remains in effect, it should be interpreted according to its terms and without reference to the varying state laws of this nation's many ports." *Id.* at 740-41; *accord Union Fish*, 248 U.S. at 313 (parties to a maritime contract deemed to look to maritime law as controlling the interpretation of the contract).

Accordingly, "the rights and obligations of third party beneficiaries under a Himalaya clause should be determined with reference to the bill of lading, not state law, even if state

law is inconsistent," and therefore the contract should be interpreted according to federal law. *Wemhoener*, 5 F.3d at 740.[5] State law does not apply to foreign bills of lading for transportation of goods into the United States.[6] The Eleventh Circuit erred in its application of *Herd*, see *Calderon* v. *Atlas S.S. Co.*, 170 U.S. 272, 280 (1898) (liability limitation clauses must be given their plain meaning before rules of construction are applied), but it was correct to apply federal law.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

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[5] The Fourth Circuit incorrectly supposed that the Second Circuit stated a contrary rule in *Colgate Palmolive Co.* v. *S/S Dart Canada*, 724 F.2d 313 (2d Cir. 1983). *See Wemhoener*, 5 F.3d at 741. *Colgate* did not involve a carrier's bill of lading or a Himalaya Clause, but instead a storage contract where a terminal operator incorporated the terms of a carrier's bill of lading (including COGSA liability limitations) into its dock receipts when it accepted cargo for later loading onto a ship. In that context, the Second Circuit held that the validity of the terminal operator's incorporation of COGSA liability limits into a storage contract was governed by state law. 724 F.2d at 315.

[6] On this question as well, neither party invoked foreign law as governing the interpretation of the Himalaya Clause or as conflicting with federal law, and the parties throughout (like the Eleventh Circuit) treated the question presented as an issue of federal law governed by *Herd*. U.S. Cert. Br. 13. Indeed, respondents secured interlocutory review in the Eleventh Circuit on the basis of a circuit conflict on the proper rule of federal law to apply. Pet. 23a; Pet. App. 24a. In any event, respondents concede that Australian and federal law adopt the same principles of the general maritime law on this issue. Resp. Cert. Supp. Br. 10. Finally, even if this Court were to conclude that federal law does not apply, it still must reverse the judgment below, because the Eleventh Circuit based its ruling solely on federal law.

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No. 02-1028

In the Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY, PETITIONER

v.

JAMES N. KIRBY, PTY LTD., DBA KIRBY ENGINEERING, AND ALLIANZ AUSTRALIA LIMITED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether a foreign cargo owner who shipped goods to an inland destination in the United States using a shipping intermediary is bound by liability limitations in the intermediary's bill of lading, or in the bill of lading that a subcontracting ocean carrier issued to the intermediary, when suing a railroad that subcontracted to deliver the goods to their destination.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case involves the interpretation and application of limitation-of-liability provisions contained in two contracts for the transportation of goods. Performance of each contract involved both sea and rail carriage. The Federal Maritime Commission exercises regulatory authority over the maritime shipping industry, and the Surface Transportation Board performs similar regulatory functions with respect to railroad commerce. The Department of Transportation is responsible for establishing the Nation's overall transportation policy and for coordinating the administration of federal programs involving both maritime and rail transportation. This Court's disposition of the question presented implicates the responsibilities of each of those federal agencies. At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. A bill of lading is a contractual document recording that a carrier has received certain goods from a shipper and "govern[ing] the relationship of the parties before delivery

of the goods." 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* 60 (3d ed. 2001). Since the 19th Century, it has been "prevalent practice for [maritime] common carriers to insert clauses in bills of lading exempting themselves from liability for damage or loss, limiting the period in which plaintiffs had to present their notice of claim or bring suit, and capping any damages awards per package." *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 534-535 (1995). To promote uniform shipping practice and law among nations, the Hague Rules of 1921 were adopted with minor modifications by international convention in 1924. See International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931; 2 Schoenbaum, *supra*, at 75. In 1936, Congress implemented the Hague Rules by enacting the Carriage of Goods by Sea Act (COGSA), ch. 229, 49 Stat. 1207 (46 U.S.C. App. 1300 *et seq.*). See generally *Vimar Seguros*, 515 U.S. at 536-537; Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 142-144 (2d ed. 1975).[1]

COGSA governs "[e]very bill of lading * * * for the carriage of goods by sea to or from ports of the United States, in foreign trade." 46 U.S.C. App. 1300. The Act grants shippers certain rights against common carriers and establishes carriers' minimum liability for cargo damage or loss. See 46 U.S.C. App. 1302-1304. Of particular relevance

[1] Some countries, including the United States, still apply the Hague Rules. Other nations (including most of this country's trading partners) apply the Hague-Visby Rules, which entered into force in 1977 and impose higher liability limits than the Hague Rules. Still other countries are parties to the Hamburg Convention, which entered into force in 1992 and imposes liability limits higher than the Hague-Visby limits. Because of the serious commercial problems caused by that lack of uniformity, the United Nations Commission on International Trade Law is currently developing a new, comprehensive convention governing carriage of goods by sea, which is intended to replace all existing rules. See note 11, *infra*. The United States is an active participant in the process of negotiating that convention.

here, COGSA establishes a default rule limiting carrier liability "for any loss or damage to or in connection with the transportation of goods" to no more than $500 per package, "unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading." 46 U.S.C. App. 1304(5). COGSA permits the carrier and shipper to agree to a higher liability cap, but not a lower one. 46 U.S.C. App. 1304(5). In practice, maritime bills of lading typically incorporate COGSA's $500-per-package liability limitation with respect to the carriage of goods by sea. Shippers pay a reduced transport rate that reflects the carriers' reduced risk and obtain private insurance for the excess value of their goods. See Michael F. Sturley, *Carriage of Goods by Sea*, 31 J. Mar. L. & Com. 241, 244 (2000).[2]

2. A cargo owner seeking to arrange for sea carriage of goods will often contract, not with the actual operator of a vessel, but with a shipping intermediary, who arranges for transportation and may also combine the goods of various shippers into larger loads bound for the same location. The role of shipping intermediaries has taken on increased importance with the advent of the so-called "container revolution." Modern container transport involves "large, reusable metal receptacles [containers], ranging in length from 20 to 40 feet * * * which can be moved on and off an ocean vessel unopened." *NLRB* v. *International Longshoremen's Ass'n*, 447 U.S. 490, 494 (1980). The standardized dimensions of

[2] A shipper has the right to declare a higher value for its goods and thereby obtain a higher liability limit, but it must in return pay an additional ad valorem freight charge. As one commentator explains,

> virtually no sensible shipper would declare a higher value—no matter how clearly the opportunity to do so is presented—because the ad valorem freight charge that would be triggered by a declaration is almost invariably higher than the premium that a cargo underwriter would charge for insuring the same shipment. Furthermore, cargo insurance covers a wider range of risks and cargo insurers pay claims more quickly.

Sturley, *supra*, 31 J. Mar. L. & Comm. at 244.

containers allow ships to carry more cargo and to be loaded and unloaded in far less time than before. See *id.* at 494-496. The Maritime Administration of the Department of Transportation advises that in Fiscal Year 2002, approximately 28% (by weight) of international waterborne cargo in the United States was containerized. By combining the goods of different owners for transport to a common location, intermediaries enable cargo owners to share in the efficiencies of containerization even if their shipments to particular destinations are infrequent, or too small to fill a container. See *International Longshoremen's Ass'n*, 447 U.S. at 495-496 & n.8; 2 Schoenbaum, *supra*, at 30.

Congress recognized the important role of shipping intermediaries in the Shipping Act of 1984, 46 U.S.C. App. 1701 *et seq.* (Shipping Act), which requires licensing of certain intermediaries and establishes regulatory oversight of their activities by the Federal Maritime Commission (FMC). See 46 U.S.C. App. 1702(17) and 1718. The Shipping Act creates the statutory classification of "ocean transportation intermediary," which includes both "ocean freight forwarder[s]" and "non-vessel-operating common carrier[s]" (NVOCCs). Ocean freight forwarders act as shippers' agents, arranging for shipments from the United States via common carrier "on behalf of shippers." 46 U.S.C. App. 1702(17)(A). FMC regulations provide that, if an ocean freight forwarder is identified in the bill of lading, its status as agent of the shipper must be indicated as well. 46 C.F.R. 515.42(a). In contrast, although NVOCCs operate and are regulated as common carriers, they do not own the vessels used for transport, and they are defined as shippers in their relationships with vessel-operating common carriers. See 46 U.S.C. App. 1702(6) and (17)(B). Thus, under the Shipping Act, the crucial distinctions between NVOCCs and "ocean freight forwarders" are that the former but not the latter issue bills of lading in their own names, are treated as common carriers, and "assume[] responsibility for the transportation from the

port or point of receipt to the port or point of destination," 46 U.S.C. App. 1702(6)(A)—meaning that an NVOCC can be held liable to the shipper if the goods are lost or damaged in transit, even if the NVOCC has exercised due care in the selection of a vessel operator.

The Shipping Act's distinction between "ocean freight forwarders" and NVOCCs corresponds to a long-recognized distinction in the railroad industry "between two very different kinds of 'forwarders.'" *Chicago, Milwaukee, St. Paul & Pac. R.R.* v. *Acme Fast Freight, Inc.*, 336 U.S. 465, 484 (1949). As the Court in *Acme Fast Freight* explained, "[t]he term ['forwarder'] was originally applied to persons who arrange for the transportation by common carrier of the shipper's goods," and whose "duties, as agent of the shipper, went no farther than procuring transportation by carrier and handling the details of shipment." *Ibid.* Subsequently, "a different type of forwarding service was offered," in which the forwarder "held itself out not merely to arrange with common carriers for the transportation of the goods, but rather to deliver them safely to the consignee." *Ibid.* From an early date, the two types of forwarders were subject to "differing standards of liability." *Ibid.* "When goods handled by an agent-forwarder were lost or damaged, it was liable to the shipper only for its own negligence, including negligence in selecting a carrier." *Id.* at 484-485. The second type of forwarder, by contrast, "was subjected to common carrier liability for loss or damage whether it or an underlying carrier had been at fault," on the ground that "[i]ts undertaking was to deliver the shipment safely at the destination." *Id.* at 485.

3. The requirements and prohibitions contained in COGSA apply of their own force only "from the time when the goods are loaded on to the time when they are discharged from the ship." 46 U.S.C. App. 1301(e). COGSA makes clear, however, that the Act does not preclude the carrier and shipper from agreeing to limits on the carrier's liability for any loss or damage that may occur "prior to the

loading on and subsequent to the discharge from the ship on which the goods are carried by sea." 46 U.S.C. App. 1307. Consistent with that provision, the International Federation of Freight Forwarders Associations (FIATA) has developed a standard bill of lading, known as the FIATA Multimodal Transport Bill of Lading (FBL), that is principally designed for "multimodal" transportation agreements—*i.e.*, agreements involving the carriage of goods using two or more modes of transportation. See Pet. App. 54a-60a (standard conditions governing FBL).

The FBL defines the rights and responsibilities of the "Freight Forwarder"—a term that is defined, for purposes of the FBL, as "the Multimodal Transport Operator [MTO] who issues this FBL and is named on the face of it and assumes liability for the performance of the multimodal transport contract as a carrier." Pet. App. 54a. Under Clause 2.2 of the FBL, the Freight Forwarder is responsible for the acts and omissions of servants, agents, or other persons whose services are used to perform the contract. *Id.* at 55a. Because an FBL Freight Forwarder "assumes liability for the performance of the multimodal transport contract as a carrier," *id.* at 54a, the FBL applies only to the second category of transportation intermediary described by this Court in *Acme Fast Freight*, 336 U.S. at 484-485. See p. 5, *supra*.[3]

Clause 8 of the FBL limits the maximum liability of the Freight Forwarder under various circumstances. Clause 8.6(a) provides that, if "an applicable international convention or mandatory national law" establishes a specific limit of liability for the particular stage of the transportation on

[3] Under the Shipping Act, by contrast, the term "ocean freight forwarder," see 46 U.S.C. App. 1702(17)(A), refers only to the *first* type of transportation intermediary described in *Acme Fast Freight*—*i.e.*, an intermediary who arranges for transportation on behalf of shippers but does not undertake a contractual commitment to deliver the goods to their destination. The Court in *Acme Fast Freight* used the term "forwarder" to refer to *both* types of intermediaries. See 336 U.S. at 484-485.

which the goods were lost or damaged, that limit will govern the Freight Forwarder's liability. Pet. App. 58a. Clause 8.6(b) states that, unless the shipper has declared the value of the goods and has paid the ad valorem rate, the Freight Forwarder's liability for damage or loss occurring at sea is limited to $500 per package if COGSA is applicable. *Ibid.*; see *id.* at 57a (Clause 7.3); 46 U.S.C. App. 1300 (COGSA applies to "carriage of goods by sea to or from ports of the United States, in foreign trade.").

Clause 8.3 of the FBL contains a fallback limitation of liability. Pet. App. 57a. It provides that the "Freight Forwarder shall in no event" be liable for more than the greater of 666.67 SDR per package or 2 SDR per kilogram of the lost or damaged goods, unless the shipper declares the value of the goods and pays the higher ad valorem freight rate. *Ibid.*[4] By its terms, Clause 8.3 applies when goods are known to have been lost or damaged on a leg of the transportation to which COGSA is inapplicable, and no "international convention or mandatory national law" (Clause 8.6(a); Pet. App. 58a) establishes an alternative limit.

Clause 10.1 of the FBL is a so-called "Himalaya Clause" (see Pet. App. 2a & n.1) that extends the intermediary's liability limitations to other parties. See *id.* at 5a. The FBL's Himalaya Clause provides that the conditions of transport stated in the FBL "apply whenever claims relating to the performance of the contract evidenced by this FBL are made against any servant, agent or other person (including any

[4] An SDR, or Special Drawing Right, is a unit of account created in 1969 by the International Monetary Fund (IMF). As of March 22, 2004, one SDR was valued at $1.48005 U.S., see <
>, and the value of 666.67 SDR was therefore slightly less than $1000 U.S. Since the liability limit established by Clause 8.3 is the *greater* of 666.67 SDR per package or 2 SDR per kilogram, see Pet. App. 57a, the liability limit for an unusually heavy package may be substantially greater than COGSA's $500 limit.

independent contractor) whose services have been used in order to perform the contract." Pet. App. 59a.

4. a. Respondent James N. Kirby Pty Limited (Kirby) contracted with International Cargo Control Pty Ltd. (ICC) for "through" (*i.e.*, end-to-end) transportation of ten containers of machinery from Sydney, Australia, to Huntsville, Alabama. Pet. App. 2a, 3a, 27a; Br. in Opp. 4. ICC issued Kirby a bill of lading that designated Sydney as the place where ICC received the goods and as the port of loading; Savannah, Georgia, as the port of discharge from the ship; and Huntsville (a city more than 300 miles inland from Savannah) as the place of delivery. Pet. App. 66a. That bill of lading also incorporated the standard conditions set forth in the FBL. See *id.* at 67a. Kirby did not declare the goods' value or pay an additional ad valorem charge. *Id.* at 30a. To obtain additional protection against loss of or damage to its machinery, Kirby insured the cargo with the predecessor of respondent Allianz Australia Limited. See *id.* at 4a n.4; Br. in Opp. 5 n.4.

b. ICC subcontracted with an ocean shipping company known as Hamburg Sud for the transport of Kirby's machinery from Sydney to Huntsville. Pet. App. 3a-4a. Hamburg Sud issued ICC a bill of lading for the cargo. See *id.* at 68a; see also *id.* at 61a-64a (excerpts from Hamburg Sud bill). Clause 4 of the bill of lading committed Hamburg Sud to "provide transportation to/from sea terminal and [specified] inland points, which may well involve transport by rail." *Id.* at 61a. Clause 17 provided generally that "the Carrier's liability shall be limited to U.S. $500 lawful money per package or per customary freight unit unless the nature of the cargo and valuation higher than $500 per package or per customary freight unit shall have been declared by Merchant before shipment and inserted in [the] Bill of Lading, and extra freight paid if required." *Id.* at 64a. ICC did not declare the goods' value or pay an additional ad valorem charge. *Id.* at 31a.

The Hamburg Sud/ICC bill also included a Himalaya Clause that extended Hamburg Sud's contractual protections to other parties. Clause 5(a) stated that Hamburg Sud "shall be entitled to sub-contract on any terms the whole or any part of the carriage, loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by it." Pet. App. 62a. Clause 5(b) stated that "all exemptions, limitations of, and exonerations from liability" provided under the Hamburg Sud/ICC bill of lading "shall be available to all agents, servants, employees, representatives, all participating (including inland) carriers * * * and all independent contractors whatsoever." *Id.* at 63a.

c. Hamburg Sud's ship carried Kirby's machinery from Sydney to Savannah, where Columbus Line USA hired petitioner Norfolk Southern Railroad Company to carry the cargo by rail to Huntsville. Pet. App. 4a & n.3.[5] Petitioner "did not issue its own bill of lading to Columbus Line, but instead acted under the Hamburg Sud bill." *Id.* at 4a. Petitioner's train derailed between Savannah and Huntsville, allegedly causing $1.5 million dollars of damage to Kirby's machinery. *Ibid.* Kirby was reimbursed for the loss by its insurer/co-respondent. *Id.* at 4a n.4.

5. Respondents sued petitioner in the United States District Court for the Northern District of Georgia, alleging both tort and contract claims. Pet. App. 4a; see J.A. 33-36, 37-38 (Second Amended Complaint). Petitioner raised as a defense the $500-per-package liability limitation contained in the Hamburg Sud/ICC bill and argued that its liability, if any, is limited to a total of $5000. See Pet. App. 29a, 31a-32a.

The district court granted petitioner's motion for partial summary judgment. Pet. App. 27a-38a. The court held that

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[5] The parties disagree as to the exact relationship between Hamburg Sud and Columbus Line USA. Pet. App. 4a n.3. Petitioner contends that Columbus Line USA is simply the name under which Hamburg Sud conducts business in the United States; respondents argue that Columbus Line USA is a separate corporate subsidiary of Hamburg Sud. *Ibid.*

respondents' claims against petitioner are subject to the liability limitation in the Hamburg Sud/ICC bill of lading, because that was the contract under which petitioner "contracted and performed." *Id.* at 37a. The court accordingly determined that petitioner's liability is limited to $500 for each of ten "packages" of machinery, or $5000. *Id.* at 38a. The court certified its decision for immediate appeal under 28 U.S.C. 1292(b). See Pet. App. 21a-26a.

6. The United States Court of Appeals for the Eleventh Circuit reversed. Pet. App. 1a-20a.

a. The court of appeals first held that petitioner's potential liability is unaffected by the provisions of the Hamburg Sud/ICC bill of lading. Pet. App. 6a-11a. The court expressed the view that, because Kirby was not a party to the Hamburg Sud/ICC bill (see *id.* at 6a), it could be bound by that bill's liability limitations "only if ICC was acting as Kirby's agent when it received Hamburg Sud's bill." *Id.* at 7a. The court of appeals examined the relevant documents and the course of dealing between the parties and concluded that ICC had not acted as Kirby's agent when it contracted with Hamburg Sud. *Id.* at 7a-10a.

b. The court of appeals also held that petitioner is not protected by the liability limits contained in the ICC/Kirby bill of lading. Pet. App. 11a-18a. The court construed the term "independent contractor" in the ICC/Kirby bill's Himalaya Clause as limited to parties that are in privity of contract with the carrier. *Id.* at 14a n.11; see *id.* at 12a-14a. The court also suggested that "a special degree of linguistic specificity is required to extend the benefits of a Himalaya clause to an inland carrier." *Id.* at 16a. Finally, the court observed that "[t]he FBL form was drafted based on a 'network' approach to carrier liability," which "envisions that each leg of a journey should be subject to the liability rules governing the mode of transport for that leg." *Id.* at 17a. The court of appeals inferred that "[b]ecause the FBL was drafted with this 'network' liability system in mind, its Himalaya clause was not designed to extend the liability regime for sea carriers—COGSA—to inland carriers, who instead would be covered by the different liability scheme applicable to rail carriers." *Ibid.*

c. Judge Siler dissented. Pet. App. 19a-20a. Judge Siler would have found petitioner to be "a beneficiary of the Himalaya Clause in the Kirby/ICC bill of lading" because Kirby knew when the contract was formed "that an inland carrier would have to be used, because of the destination being Huntsville, Alabama." *Id.* at 19a. Judge Siler also would have held that ICC, in contracting with Hamburg Sud, was acting as Kirby's "agent," and that Kirby was therefore bound by the liability limit contained in the ICC/Hamburg Sud bill of lading. *Id.* at 20a.

SUMMARY OF ARGUMENT

I. Under the Himalaya Clause of the ICC/Kirby bill of lading, petitioner is entitled to the same limitations of liability that would apply in a suit against ICC. That reading follows from the plain language of the Himalaya Clause, which encompasses all persons "whose services have been used in order to perform the contract," and it is reinforced by other provisions of the bill of lading. The reasons given by the court of appeals for construing the Clause to exclude petitioner are unpersuasive. Nothing in the Clause's text suggests that its protections are limited to persons in privity with ICC. Because the form bill of lading on which the ICC/Kirby bill is based is specifically intended for use in *multimodal* transportation agreements, and explicity addresses the possibility that loss or damage will occur on a stage other than the sea leg of the transportation, the Himalaya Clause is naturally read to encompass inland carriers.

II. Respondents cannot recover damages from petitioner in excess of the $500-per-package liability limit set forth in the Hamburg Sud/ICC bill of lading. This Court's decision in *Great Northern Railway* v. *O'Connor*, 232 U.S. 508 (1914),

indicates that, when a carrier accepts goods for transport from an intermediary and the goods are lost or damaged, the cargo owner's recovery from the carrier may not exceed the liability limit agreed to by the carrier and the intermediary. That rule ensures that the underlying carrier can base its rates on an accurate understanding of its potential liability without discriminating in its terms of carriage between shipper-owners and transportation intermediaries—a form of discrimination that federal law forbids. Because the imposition of additional tort liability would disrupt the administration of federal common-carrier regulation, it is preempted by federal law.

It is not necessary for this Court to determine whether ICC, in contracting with Hamburg Sud, acted as Kirby's "agent." ICC was not Kirby's "agent" as that term has traditionally been understood at common law, since no fiduciary relationship existed and Kirby lacked authority to direct and control ICC in its performance of the contract. Furthermore, because ICC assumed the responsibilities of a common carrier, it was not the type of transportation intermediary that has historically been characterized as the shipper's "agent." In the field of common-carrier regulation, this Court and the courts of appeals have occasionally used the term "agent" more broadly to describe transportation entities whose services are essential to completion of the carriage. But reliance on preemption principles avoids the potential confusion that could result from inferring an "agency" relationship in the circumstances of this case.

ARGUMENT

I. PURSUANT TO THE HIMALAYA CLAUSE OF THE ICC/KIRBY BILL OF LADING, PETITIONER IS ENTITLED TO THE BENEFIT OF THE LIABILITY LIMITS SET FORTH IN CLAUSE 8 OF THAT BILL

A. Petitioner Is Encompassed Within The Plain Terms Of The ICC/Kirby Bill's Himalaya Clause

The Himalaya Clause of the ICC/Kirby bill of lading states that the conditions set forth in the contract "apply whenever claims relating to the performance of the contract * * * are made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract." Pet. App. 59a (Clause 10.1). That Clause plainly encompasses underlying carriers like petitioner whose services were required in order to complete the transport contemplated by the bill of lading.

In *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959), this Court considered the question whether the limitation-of-liability provisions of an ocean bill of lading, which stated that "the Carrier's liability, if any, shall be determined on the basis of $500 per package," affected the liability of a stevedoring company hired by the carrier. *Id.* at 302; see *id.* at 298-299. The Court held that the stevedoring company's liability to the cargo owners was unaffected by those contractual provisions. See *id.* at 302-308. Because the limitation-of-liability provisions by their terms "deal[t] only with the 'Carrier's liability' to the shippers," the Court found "nothing in those provisions to indicate that the contracting parties intended to limit the liability of stevedores or other agents of the carrier for damages caused by their negligence." *Id.* at 302. The Court did not question the *ability* of contracting parties to establish binding limitations on the potential liability of agents, subcontractors, or other third parties whose services facilitate the performance of the contract. The Court held, however, that such provisions "must

be strictly construed and limited to intended beneficiaries," and should not be interpreted to protect third-party beneficiaries "unless the clarity of the language used expresses such to be the understanding of the contracting parties." *Id.* at 305 (citation and internal quotation marks omitted).

The Court's decision in *Herd* makes clear that the provisions of Clause 8 of the ICC/Kirby bill of lading—which by its terms establishes a "Limitation of [the] Freight Forwarder's [*i.e.*, ICC's] Liability," Pet. App. 57a—do not *automatically* apply in suits against a third party such as petitioner. The Himalaya Clause (Clause 10.1) of the ICC/Kirby bill, however, provides the clear expression of intent to limit the liability of third parties that was lacking in *Herd*. Clause 10.1 makes the liability limits contained in Clause 8 broadly applicable to "any * * * person (including any independent contractor) whose services have been used in order to perform the contract." *Id.* at 59a. Because the ICC/Kirby bill of lading provides for carriage of goods from Sydney, Australia, to Huntsville, Alabama (*id.* at 65a), and because petitioner was engaged to transport the goods on the final leg of that trip, petitioner falls squarely within the literal coverage of the Himalaya Clause. *Herd*'s "clarity of * * * language" requirement (359 U.S. at 305) is therefore satisfied in this case.

B. Other Provisions Of The ICC/Kirby Bill Of Lading Reinforce The Conclusion That The Himalaya Clause Was Intended To Encompass Petitioner

Clauses 2 and 6 of the ICC/Kirby bill of lading, which define the nature of ICC's contractual undertaking and the circumstances under which it may be held liable for loss of or damage to Kirby's goods, reinforce the conclusion that Clause 10.1 encompasses all carriers, including petitioner, who were ultimately engaged to transport those goods during any part of the journey from Sydney to Huntsville. Clause 2.2 of the bill provides that ICC "shall be responsible

for the acts and omissions of his servants or agents acting within the scope of their employment, *or any other person of whose services he makes use for the performance of the contract evidenced by this FBL*, as if such acts and omissions were his own." Pet. App. 55a (emphasis added). The italicized language in Clause 2.2 is not meaningfully different from the disputed phrase in Clause 10.1—*i.e.*, "person (including any independent contractor) whose services have been used in order to perform the contract." *Id.* at 59a. Clause 6.2 of the FBL states that ICC "shall be liable for loss of or damage to the goods * * * unless [ICC] proves that no fault or neglect of his own, his servants or agents or any other person referred to in Clause 2.2 has caused or contributed to such loss [or] damage." *Id.* at 56a.

The FBL's drafters surely intended that inland secondary carriers such as petitioner would be treated as "person[s] of whose services [ICC] makes use for the performance of the contract" within the meaning of Clause 2.2. Pet. App. 55a. Clauses 2.2 and 6.2 are intended to effectuate ICC's contractual commitment "to perform and/or in his own name to procure the performance of the entire transport, from the place at which the goods are taken in charge * * * to the place of delivery." *Ibid.* (Clause 2.1(a)). If petitioner were found *not* to be one of the "person[s]" referred to in Clause 2.2, then proof that the damage to Kirby's goods occurred during the rail leg of the transportation would be sufficient to establish that "no fault or neglect of [ICC's] own, his servants or agents or any other person referred to in Clause 2.2 has caused or contributed to such * * * damage." *Id.* at 56a (Clause 6.2). Under that reading of the FBL, ICC would escape all liability to Kirby under Clause 6.2—a result clearly inconsistent with ICC's status as a common carrier and its contractual commitment to deliver the goods to their ultimate destination. To prevent that result, Clause 2.2's reference to "person[s] of whose services [ICC] makes use for the performance of the contract" must be construed to

encompass petitioner. There is no basis for giving the nearly identical language in Clause 10.1 a more limited construction.

C. The Court Of Appeals' Reasons For Construing The Himalaya Clause To Exclude Petitioner Are Unpersuasive

1. The court of appeals announced, as a rule of construction governing Himalaya Clauses generally, that terms such as "agent," "servant," or "independent contractor" should be read to apply only to persons who are in privity of contract with the primary carrier (here, ICC). Pet. App. 14a n.11. That interpretive rule has no basis in logic, and it produces a result that is demonstrably inconsistent with the text of the ICC/Kirby bill.

Certainly a Himalaya Clause *could* be drafted so that its protections would be limited to persons in contractual privity with the shipping intermediary or other carrier. Under any ordinary understanding of the contractual language actually contained in the ICC/Kirby bill, however, petitioner is unquestionably an "independent contractor" (not to mention a legal "person") "whose services have been used in order to perform the contract." Pet. App. 59a; see p. 14, *supra*. The *Herd* Court's holding that limitation-of-liability provisions "must be strictly construed and limited to intended beneficiaries," 359 U.S. at 305, provides no basis for the court of appeals' addition of a privity requirement that is not reasonably inferable from the text of the parties' agreement.

2. The court of appeals also suggested that "a special degree of linguistic specificity is required to extend the benefits of a Himalaya clause to an inland carrier." Pet. App. 16a. The court of appeals' interpretation of the ICC/Kirby bill's Himalaya Clause as excluding inland carriers has no basis in the text of Clause 10.1, and it is inconsistent with the purposes of the FIATA Multimodal Transport Bill of Lading (FBL) that Kirby and ICC chose to utilize.

The FBL is a form bill (see p. 6, *supra*) that, "as indicated by its very name, is intended for the case where the [transportation] contract would involve at least two different modes of transport." Jan Ramberg, *The Law of Freight Forwarding and the 1992 FIATA Multimodal Transport Bill of Lading* 50 (1993). The contract between Kirby and ICC provided for the carriage of goods from Sydney to Huntsville and is therefore characteristic of the transportation arrangements for which the FBL was drafted. With respect to the obligations and liabilities of ICC itself, the FBL is clearly intended to apply to the inland as well as the sea leg of the transportation, in order to enforce ICC's contractual commitment "to perform and/or in his own name to procure the performance of the entire transport, from the place at which the goods are taken in charge * * * to the place of delivery." Pet. App. 55a (Clause 2.1(a)).

Various other FBL provisions refer in general terms to the "performance of the contract." See Pet. App. 54a (Definitions), 55a (Clause 2.2), 59a (Clause 9). There is no basis for presuming that such provisions cover only the maritime portion of the transportation. Rather, because the FBL as a whole is specifically designed to implement agreements for *multimodal* transportation, Clause 10.1's unqualified reference to persons "whose services have been used in order to perform the contract" (*id.* at 59a) is most naturally read to encompass inland as well as maritime carriers, absent express language *excluding* inland carriers from the Clause's protection.[6]

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[6] The court of appeals relied in part on the fact that "Himalaya clauses originally were aimed more at extending COGSA protections to additional parties who handle cargo in and around a port than at extending the reach of those protections inland." Pet. App. 16a. It is true that the earliest Himalaya Clauses, which were contained in contracts for port-to-port carriage of goods by sea, were intended to make contractual limitations of liability applicable to parties (*e.g.*, stevedores) whose services were ancillary to that carriage. A Himalaya Clause contained in such an agreement would have no application to inland carriers because inland carriage would

3. The court of appeals also observed that "[t]he FBL form was drafted based on a 'network' approach to carrier liability," under which "each leg of a journey should be subject to the liability rules governing the mode of transport for that leg." Pet. App. 17a. The court inferred that, "[b]ecause the FBL was drafted with this 'network' liability system in mind, its Himalaya clause was not designed to extend the liability regime for sea carriers—COGSA—to inland carriers." *Ibid.* That analysis reflects a misunderstanding of the relationship between the liability limits contained in Clause 8 of the FBL and the Himalaya Clause (Clause 10.1).

Clause 8 of the FBL defines the maximum liability of ICC to Kirby for loss of or damage to the relevant goods. Under the "network" approach reflected in the various subparts of Clause 8, that maximum liability may vary depending on the location where that loss or damage occurs. See pp. 6-7, *supra*. Thus, ICC's potential liability to Kirby for the damage resulting from the railroad derailment in this case is greater than if the same damage had occurred during the sea leg of the transportation. Compare Pet. App. 57a (Clause 8.3) with *id.* at 58a (Clause 8.6(b)); see note 4, *supra*.[7]

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form no part of the underlying contract. That history, however, provides no basis for giving an artificially narrow construction to the phrase "person * * * whose services have been used in order to perform the contract" when that phrase appears in a bill of lading that *does* cover inland transportation.

[7] At the petition stage (U.S. Br. 16, 18), the government expressed its understanding that the ICC/Kirby bill of lading established a uniform $500-per-package liability limit applicable to all stages of the transportation. Further examination of the terms of that contract has revealed that this earlier understanding was mistaken. Because the damage to Kirby's goods is known to have occurred during the rail leg of the transportation, and because respondents have identified no "applicable international convention or mandatory national law" (Clause 8.6(a), Pet. App. 58a) that specifically limits liability for that damage, the liability of ICC (and thus, through the Himalaya Clause, of petitioner) is limited under Clause 8.3 to "666.67 SDR per package or unit or 2 SDR per kilogramme of gross weight of the goods lost or damaged, whichever is the higher." *Id.* at 57a; see p. 7 & note 4, *supra*. Respondents' supplemental brief at the petition stage states (at 9) that the liability limit under Clause 8.3, computed on a per-kilogram basis, "is about $450,000 in this case."

Under the FBL's Himalaya Clause, "the *aggregate* liability of the Freight Forwarder and of [the] servants, agents or other persons [whose services have been used in order to perform the contract] shall not exceed the limits in clause 8." Pet. App. 59a (Clause 10.1) (emphasis added). Respondents filed suit in Australia against ICC based on the same accident that is at issue here (see Pet. C.A. Br. 4 n.4), but the record in this case does not reflect the outcome of that suit. If respondents recovered damages from ICC in that suit, the amount of that recovery would be subtracted from the limit computed under Clause 8.3 in order to determine the maximum amount of petitioner's potential liability.

The Himalaya Clause, by contrast, is not used to compute the dollar amount of any defendant's maximum liability. Its function instead is to identify a class of third parties who may invoke the liability limit that applies to ICC under Clause 8, *whatever that limit may be in a particular case.* To construe the Himalaya Clause in accordance with its plain language would not, as the court of appeals supposed (Pet. App. 17a), limit petitioner's potential liability in this case to the COGSA maximum of $500 per package. Rather, under the Himalaya Clause, petitioner is entitled to the *same* limitation on liability that would apply to claims against ICC for damage occurring *during the rail leg* of the transportation. Contrary to the court of appeals' reasoning, the decision of the FBL's drafters to adopt a "network" approach to liability *supports* the textually natural reading of the Himalaya Clause as encompassing inland carriers. The different subparts of Clause 8 make clear that the drafters anticipated, and specifically addressed, the possibility of loss or damage to goods during a non-maritime leg of the transportation.

II. RESPONDENTS CANNOT RECOVER DAMAGES FROM PETITIONER IN EXCESS OF THE $500-PER-PACKAGE LIABILITY LIMIT CONTAINED IN THE HAMBURG SUD/ICC BILL OF LADING

A. Under This Court's Decision In *Great Northern Railway* v. *O'Connor*, A Cargo Owner Ordinarily Cannot Recover Damages From An Underlying Carrier That Exceed The Liability Limits Agreed To By The Carrier And The Transportation Intermediary

This Court's decision in *Great Northern Railway* v. *O'Connor*, 232 U.S. 508 (1914), indicates that, when a carrier accepts goods for transport from an intermediary and the goods are lost or damaged, the cargo owner's recovery from the carrier may not exceed the liability limit agreed to by the carrier and the intermediary. The railroad in *Great Northern* had published tariffs for carload lots of $1.60 per cwt. (*i.e.*, 100 pounds) if the value of the goods was not stated, and $1.00 per cwt. if the value was declared not to exceed $10.00 per cwt. *Id.* at 509 (Statement of the Case). The plaintiff employed the Boyd Transfer Company to arrange for shipment of household goods, weighing 545 pounds and worth $598, from Minnesota to Oregon. *Id.* at 513 (opinion of the Court). Without express authority from the plaintiff, the transfer company shipped the goods by rail at the $1.00 per cwt. rate. *Ibid.* The goods were destroyed en route, and the Minnesota Supreme Court held that the plaintiff could recover the full value of the cargo from the railroad. *Ibid.*

This Court reversed. The Court held that, "[i]n the absence of something to indicate that the Transfer Company was guilty of false billing, the carrier was not required to make special inquiry, but could rely on the statement that the car was loaded with goods of the character and value stated." 232 U.S. at 514. In the Court's view, that principle followed logically from its prior holding in *ICC* v. *Delaware, Lackawanna & Western Railroad*, 220 U.S. 235 (1911), that

railroad common carriers are "not concerned with the question of title, but must treat the Forwarder as shipper and charge the rates applicable to the quantity of freight tendered regardless of who owned the separate articles." *Great Northern*, 232 U.S. at 514. The Court in *Great Northern* made clear that the railroad's liability would be limited to $10 per cwt.—the maximum value for which the $1.00 per cwt. carload rate was available—regardless of whether the plaintiff had authorized the transfer company to declare the value of the goods or to ship them at that reduced rate. The Court explained that "the carrier had the right to assume that the Transfer Company could agree upon the terms of the shipment," and it concluded that "[t]he carrier was not bound by [the plaintiff's] private instructions or limitation on the authority of the Transfer Company, whether it be treated as agent or Forwarder. If there was any undervaluation, wrongful classification or violation of her instructions, resulting in damage, the plaintiff has her remedy against that Company." *Id.* at 514-515.

The same principle applies here. Hamburg Sud "was not bound by [Kirby's] private instructions" or agreement with ICC, and Hamburg Sud "had the right to assume that [ICC] could agree upon" the limitation-of-liability provisions that would govern carriage of the goods by Hamburg Sud (and by others who, like petitioner, "acted under the Hamburg Sud bill," Pet. App. 4a).

B. The Rule Announced By The Court Of Appeals Is Preempted Because It Would Disrupt Established Commercial Practices And Subvert Longstanding Principles Of Federal Common-Carrier Regulation

The court of appeals did not dispute that, if ICC had owned the relevant cargo, the Hamburg Sud/ICC bill of lading would have insulated Hamburg Sud and its subcontractors from liability in excess of the $500-per-package limit. Viewing the matter *ex ante*, the enforceability of such

contractual provisions would have served ICC's interests as well, since it would have allowed ICC to obtain the lower carriage rate that is the usual *quid pro quo* for a contractual limit on potential liability. See p. 3 & note 2, *supra*. The court of appeals held, however, that the Hamburg Sud/ICC bill could not effectively limit the liability of Hamburg Sud and its subcontractors in this case because the shipper with whom Hamburg Sud dealt was a transportation intermediary rather than the owner of the goods.

It is well established that a state law damages remedy may be preempted if it "stands as an obstacle to the accomplishment and execution of" federal law. *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 873 (2000) (citation omitted). Imposition of liability on petitioner in excess of the $500-per-package limit set forth in the Hamburg Sud/ICC bill of lading is preempted under that standard.

1. Historically, a core feature of federal common-carrier regulation was a tariff regime under which the rate of carriage varied depending on the carrier's maximum exposure to damages liability.[8] Although the shipper could insist that the carrier assume potential liability for the full value of the goods, the carrier was entitled in return to impose a higher freight charge. The Court's decision in *Acme Fast Freight* refutes any suggestion that this essential tradeoff should be abandoned simply because the entity presenting the goods for shipment is a transportation intermediary. The Court in that case addressed the question "whether, granting that both forwarder and underlying carrier must issue bills of lading, the liability provisions of bills issued by the latter are

[8] With respect to the transport of goods to and from the United States by sea, that tariff regime is currently embodied in the Shipping Act, 46 U.S.C. App. 1707, and regulations promulgated by the FMC, see 46 C.F.R. Pt. 520. With respect to rail carriage under common-carrier rates, that regime is embodied in the Interstate Commerce Act, as amended. See 49 U.S.C. 11706(a) and (c)(3)(A); *Southeastern Express Co.* v. *Pastime Amusement Co.*, 299 U.S. 28 (1936).

to be considered null and void when forwarder freight is being hauled." 336 U.S. at 480. The Court held that "the whole scheme of the [Freight Forwarder] Act, its language and history, negative that proposition." *Ibid.*

The maritime shipper's option to obtain a higher liability limit by paying a higher carriage rate has less practical significance now than it did in an earlier day, simply because that option is very rarely exercised. Rather, maritime shippers almost always accept a low liability limit and protect themselves against loss or damage by purchasing insurance. See note 2, *supra*. It remains the case, however, that, other things being equal, a carrier's rate will vary depending on the liability limit established by the contract. Indeed, it is precisely "because the ad valorem freight charge that would be triggered by a declaration [of value] is almost invariably higher than the premium that a cargo underwriter would charge for insuring the same shipment," Sturley, *supra*, 31 J. Mar. L. & Comm. at 244, that shippers typically prefer to purchase insurance rather than to negotiate a higher liability limit.

The rule announced by the court of appeals would substantially disrupt established commercial practices by preventing the underlying carrier from linking its rate to its potential liability. Although a carrier in Hamburg Sud's position should be aware when the shipper with whom it is dealing is a transportation intermediary rather than the owner of the cargo, it may not be privy to the details of the intermediary's own bill of lading, including the liability limit that applies under that bill and the scope of coverage of any Himalaya Clause. If the rule announced by the court of appeals in this case is upheld, an underlying carrier will therefore frequently lack any assurance that the liability limit contained in its own bill of lading is legally enforceable, and will have no clear understanding of what alternative limit might apply. The carrier may also be unaware of the actual value of the relevant goods, and thus of the dollar

amount of the money judgment that "full" liability would entail. Those uncertainties would effectively preclude the carrier from setting rates based on its actual maximum exposure, and would thus subvert a central and longstanding feature of the federal regime.

2. To avoid those uncertainties, the carrier might attempt to adjust its contracting practices depending on whether a particular shipper is a transportation intermediary or the owner of the goods. For a carrier to differentiate among shippers on that basis, however, would itself be inconsistent with established legal and commercial norms. Nearly 100 years ago, this Court invalidated the practice of charging lower rates to shippers who deliver their own property than to shippers, such as freight forwarders, who consolidate goods belonging to various owners. See *Delaware, Lackawanna & W. R.R.*, 220 U.S. at 251-256. Noting that longstanding English law "forbade the charging of a higher rate for the carriage of goods for an intercepting or forwarding agent than for others," *id.* at 254, the Court held that to distinguish between owners and non-owners would be "discriminatory" within the meaning of the Interstate Commerce Act, and "in conflict with the * * * elementary duty resting upon a carrier * * * [and] the rights of shippers," *id.* at 252. Accord *Acme Fast Freight*, 336 U.S. at 476.

Maritime carriers are subject to analogous nondiscrimination requirements under the Shipping Act of 1984 and its predecessor Shipping Act of 1916. See 46 U.S.C. App. 1709(b)(3) (prohibiting "unfair or unjustly discriminatory methods"); 46 U.S.C. App. 1709(b)(4)-(5) (prohibiting "any unfair or unjustly discriminatory practice"); 46 U.S.C. App. 1701(1) (establishing "a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce"); *United States Navigation Co.* v. *Cunard S.S.*, 284 U.S. 474, 480-481 (1932); *Waterfront Comm'n* v. *Elizabeth-Newark Shipping, Inc.*, 164 F.3d 177, 185 (3d Cir. 1998). The FMC has long taken the view that

differentiation by an ocean carrier between NVOCCs and shipper-owners is a form of unreasonable discrimination that is prohibited by the Shipping Act. See, *e.g.*, 50 Fed. Reg. 38,896-38,897 (1985) (citing *Delaware, Lackawanna & W. R.R., supra*); 50 Fed. Reg. 14,708-14,709 & n.5 (1985) (same).[9] Hamburg Sud is therefore precluded by federal law from differentiating in its rates of carriage between shipper-owners and NVOCCs. Indeed, since "discriminatory 'privileges' come in many guises, and are not limited to discounted rates," *AT&T Co.* v. *Central Office Tel., Inc.*, 524 U.S. 214, 224 (1998) (citing Interstate Commerce Act precedents), Hamburg Sud would likely violate the Shipping Act's nondiscrimination mandate if it entered into carriage agreements for two otherwise identical shipments, charged each shipper the same rate, but provided one shipper a more favorable (*i.e.*, higher) liability limit than the other. The practical effect of the court of appeals' decision in this case, however, is to mandate precisely that discriminatory result, because cargo owners who deal directly with Hamburg Sud are bound by the liability limit in Hamburg Sud's bill of lading, while cargo owners who ship through an intermediary are not, even if the transactions are otherwise identical and Hamburg Sud charges the same carriage rate in both instances.

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[9] With respect to carriage of goods by rail, the statutory ban on unreasonable discrimination remains in force, see 49 U.S.C. 10741(a), though it is subject to significant exceptions. The nondiscrimination requirement does not apply to rail traffic moving under Section 10709 rail transportation contracts. See 49 U.S.C. 10741(b)(1). Pursuant to 49 U.S.C. 10502, the Interstate Commerce Commission (the STB's predecessor agency) has exempted rail movement of containerized freight from most provisions of Subtitle IV of Title 49, including the nondiscrimination requirement of Section 10741(a). See 49 C.F.R. Pt. 1090; *American Trucking Ass'ns* v. *ICC*, 656 F.2d 1115 (5th Cir. 1981). The nondiscrimination provisions of the Shipping Act, however, are not subject to comparable exceptions, and those provisions apply to multimodal bills of lading (like the Hamburg Sud bill) issued by maritime carriers.

In holding that the shipper in *Great Northern* could not recover damages in excess of the liability limit agreed to by the railroad and the transportation intermediary, the Court invoked the principle that common carriers "[a]re not concerned with the question of title, but must treat the Forwarder as shipper and charge the rates applicable to the quantity of freight tendered regardless of who owned the separate articles." 232 U.S. at 514 (citing *Delaware, Lackawanna & W. R.R., supra*). Although the precise doctrinal basis for the Court's decision in *Great Northern* is unclear, that ruling seems best understood as based on federal preemption of inconsistent state law. If a carrier in Hamburg Sud's position is unable to rely on the liability limit contained in its own bill of lading, it will frequently be forced either (a) to set rates of carriage without accurate information as to its actual damages exposure (contrary to the goals of the tariff regime), or (b) to avoid that uncertainty by differentiating between owners and non-owners in its own rates of carriage (in violation of the Shipping Act's nondiscrimination principle). In either event, the rule announced by the court of appeals would "stand[] as an obstacle to the accomplishment and execution of" federal law. *Geier*, 529 U.S. at 873.[10]

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[10] Respondents cannot avoid the preemptive force of the federal scheme on the ground that, under the circumstances of this case, Kirby's own contract (the ICC/Kirby bill) provides a liability limit significantly greater than $500 per package for loss or damage to the goods during the rail leg of the transportation. See pp. 18-19 & n.7, *supra*. *Whenever* federal law is held to preempt state tort remedies, the effect is to foreclose the plaintiff from collecting damages to which it might otherwise be entitled. In any event, the core protection for which Kirby bargained was that ICC would accept the duties of a common carrier and would be liable (subject to the limits to which Kirby agreed under Clause 8 of the ICC/Kirby bill) for any loss of or damage to the goods. Under the Himalaya Clause of the ICC/Kirby bill, moreover, Kirby agreed that Clause 8 would define the maximum *aggregate* liability of ICC and all others whose services were used to perform the contract. See note 7, *supra*. Because respondents' right to recover that full amount from ICC remains intact, any restriction on their ability to proceed against petitioner as an *alternative* source of recovery does not significantly disappoint respondents' contract-based expectations.

C. The Court of Appeals' Determination That ICC Did Not Act As Kirby's "Agent" Does Not Support Its Holding That Respondents Can Sue Petitioner For Damages In Excess Of The $500-Per-Package Limit Set Forth In The Hamburg Sud/ICC Bill

The court of appeals held that the Hamburg Sud/ICC bill's liability limit was inapplicable to respondents' suit against petitioner because ICC, in contracting with Hamburg Sud for the carriage of Kirby's goods, was not acting as Kirby's "agent." Pet. App. 6a-11a. Because preemption principles furnish an alternative basis for holding that respondents cannot recover damages from petitioner in excess of the Hamburg Sud/ICC bill's $500-per-package limit, there is no need to determine whether an "agency" relationship existed in this case. If the Court does address that issue, the considerations below would be relevant to the Court's analysis.

1. Under the common law, "[a]gency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement (Second) of Agency § 1(1) (1958). Issuance of the ICC/Kirby bill of lading did not create an "agency" relationship as so defined. Although ICC assumed a contractual responsibility to deliver Kirby's goods to Huntsville, that obligation is not naturally characterized as a "fiduciary" duty, and nothing in the ICC/Kirby bill suggests that ICC in its performance of the contract was "subject to [Kirby's] control." The ICC/Kirby bill did not place any constraint on ICC's selection of an underlying carrier or on its negotiation of appropriate terms of transportation, and it provided no mechanism by which Kirby could have overseen ICC's choices with respect to those matters.

Nor did ICC function as the type of transportation intermediary that has historically been characterized as the shipper's "agent." As this Court explained in *Acme Fast Freight*, the law has long recognized two distinct types of forwarders: the first "arrange[s] for the transportation by common carrier of the shipper's goods" but assumes no contractual responsibility to deliver the goods to their destination, while the second does accept that responsibility and is "subjected to common carrier liability for loss or damage whether it or an underlying carrier ha[s] been at fault." 336 U.S. at 484-485; see p. 5, *supra*. The term "agent" is often used to describe the first type of forwarder and to distinguish it from the second. See, *e.g.*, *Acme Fast Freight*, 336 U.S. at 484; Ramberg, *supra*, at 14. In the instant case, ICC clearly acted as the *second* type of forwarder, since it "assume[d] liability for the performance of the multimodal transport contract as a carrier" and accepted legal responsibility for the acts or omissions of others whose services are used to perform the contract. Pet. App. 54a (definition of "Freight Forwarder"), *id.* at 55a (Clause 2.2); see Ramberg, *supra*, at 51 (forwarder's acceptance of responsibility for conduct of others described in Clause 2.2 of the FBL "is the main distinction between the freight forwarder as a carrier and a freight forwarder acting only as an agent").

2. In the sphere of common-carrier regulation, this Court has occasionally used the term "agent" to describe transportation entities whose services are essential to completion of the carriage, even where the elements of the *Restatement* definition (*i.e.*, a fiduciary relationship, and effective control by the principal) are absent, and even where the "agent" has assumed the duties of a carrier. Thus, in *Acme Fast Freight*, the Court stated that the rationale for permitting a shipper by freight forwarder to sue the underlying carrier is that "the shipper is the undisclosed principal of its agent, the forwarder, in the latter's contract with the carrier." 336 U.S. at 488 n.27. The Court has also explained that the effect of

the Carmack Amendment to the Interstate Commerce Act (49 U.S.C. 11706), under which a common carrier that accepts goods for transportation to a destination in another State is liable to the shipper for any damage caused by a connecting carrier's acts or omissions, is to treat the connecting carrier as the initial carrier's "agent." See, *e.g.*, *Atlantic Coast Line R.R.* v. *Riverside Mills*, 219 U.S. 186, 206-207 (1911); *Northern Pac. Ry.* v. *Wall*, 241 U.S. 87, 92 (1916).

3. Similarly in the maritime context, courts of appeals have occasionally stated that "an NVOCC generally acts as the agent of the cargo owner/shipper when it contracts with the ocean carrier to ship the cargo owner's goods." *Kukje Hwajae Ins. Co.* v. *The M/V Hyundai Liberty*, 294 F.3d 1171, 1176 (9th Cir. 2002), petition for cert. pending *sub nom. Green Fire & Marine Ins. Co.* v. *M/V Hyundai Liberty*, No. 02-813 (filed Nov. 22, 2002); accord *Insurance Co. of N. Am.* v. *S/S Am. Argosy*, 732 F.2d 299, 301 (2d Cir. 1984) ("With respect to the vessel and her owner, * * * the NVOCC is an agent of the shipper."). In using that term, however, the courts have not suggested that an NVOCC in its relation to the shipper falls within the *Restatement* definition; nor have they held that the NVOCC should be treated for *all* purposes as the shipper's "agent." We are aware of no case, for example, in which the underlying carrier has invoked that putative agency relationship as a sword rather than a shield —*i.e.*, as a basis for suing the cargo owner under the contract. NVOCCs instead have been treated as shippers' agents for the purpose of determining whether the contract between the intermediary and the underlying carrier can limit the *shipper's* right of action *against* that carrier. Rather than resting on the application of general agency principles, that characterization may reflect a policy judgment that, for this limited purpose, the NVOCC should be treated *as if* it were the shipper's agent, so that the shipper will be bound by restrictions on recovery to which the intermediary and the carrier have agreed. See *Insurance Co. of*

N. Am., 732 F.2d at 304 (explaining that imposition of additional liability on the underlying carrier in a manner inconsistent with the terms of the carrier's bill of lading "would clearly conflict with the policies embodied in the tariff system" and "would also threaten the role of the bill of lading as an effective means for carriers to limit their liability").

That policy judgment is a sound one, since the approach adopted by those courts of appeals ensures that the underlying carrier can base its rates on an accurate understanding of its potential exposure to suit, without discriminating among shippers in a manner that federal law forbids. Judicial characterization of the NVOCC as the shipper's "agent," however, is a potential source of confusion: the NVOCC is *not* the shipper's "agent" as that term has traditionally been understood, and established legal and commercial relationships would be disrupted if it were treated as such for all purposes.[11] Those potential difficulties are avoided if the same policy concerns are considered as part of a preemption analysis rather than treated as grounds for inferring an "agency" relationship. See pp. 21-26, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[11] For example, we are informed by the State Department that a legal rule treating an NVOCC as the shipper's "agent" for all purposes would substantially complicate the ongoing negotiation (see note 1, *supra*) of a comprehensive new carriage of goods convention at the United Nations Commission on International Trade Law. If the NVOCC were deemed for all purposes to be an agent of the shipper, many provisions of the draft text would need to be reevaluated, and compromises already reached might be upset. In addition, the FMC in its prior administration of the Shipping Act has rejected attempts by NVOCCs to describe themselves as "agents" in order to avoid the Act's requirements. See, *e.g.*, *Prudential Lines, Inc.* v. *Farrell Lines, Inc.*, 26 F.M.C. 497, 515-516, adopted without modification, 26 F.M.C. 496 (1984).

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In the Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY, PTY LTD., dba Kirby Engineering, and ALLIANZ AUSTRALIA LIMITED,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* AIR TRANSPORT ASSOCIATION OF AMERICA, INC., IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* AIR TRANSPORT ASSOCIATION OF AMERICA, INC.

The Air Transport Association of America, Inc., ("ATA") is an association of twenty-two U.S. and four foreign airlines.[1] The ATA's U.S. members operate within the United States and between the United States and foreign countries. Its foreign members also operate between the United States and foreign countries and are subject to suit in the United States. A principal purpose of the ATA is to support its member airlines by promoting the cost-effective delivery of air transportation services and advocating common industry positions on important policy and legal issues. Since its inception in 1936, through both regulated and deregulated eras, the ATA has been involved in the development of the law governing carriage of goods by air. That law now centers around the Airline Deregulation Act of 1978 ("ADA"), which, as the Court recognized in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992), and *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995), contemplates that market forces, rather than

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[1] This brief was authored by counsel for the ATA and not, in whole or in part, by counsel for either party. No person or entity, other than the ATA and its members, made a monetary contribution to the preparation or submission of this brief. The ATA's member airlines are: ABX Air, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, ASTAR Air Cargo, ATA Airlines, Inc., Atlas Air, Continental Airlines, Delta Air Lines, Evergreen International Airlines, FedEx Corporation, Hawaiian Airlines, JetBlue Airways, Menlo Worldwide, Midwest Airlines, Northwest Airlines, Polar Air Cargo, Southwest Airlines, United Airlines, UPS Airlines, and US Airways. Associate members are: Aeromexico, Air Canada, Air Jamaica, and Mexicana.

governmental regulation, will dictate the terms of contracts for carriage by air.

The opinion below is of significant interest to the ATA's member airlines because it threatens to upset well-established principles of law relied upon to provide certain air cargo transportation services to freight forwarders pursuant to specific contracts.[2] Like Norfolk Southern in this case, air carriers sometimes operate as connecting or "intermediate" carriers in freight-forwarding arrangements. When air carriers operate in such arrangements, they typically do so pursuant to the terms and conditions included in their own "airbills."[3] These airbills,[4] like bills of lading, are issued to the parties with whom airlines contract. Consistent with the ADA's market-based regime, air carriers expect to be governed by the terms and conditions of these airbills, even when they act as intermediate carriers.

In providing intermediate air transportation services, air carrier conduct is based in part on settled expectations recognized by the courts. Thus, when accepting goods from a freight forwarder,[5] common carriers are "not concerned with questions of ownership, but must treat the forwarder as

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[2] All parties have consented to the filing of *amicus* briefs in favor of both Petitioner and Respondents.

[3] Terms and conditions in airbills for international carriage also implement the treaty-based liability regime governing international air transportation, commonly known as the Warsaw Convention, whose original text is reprinted at 49 U.S.C. § 40105 (note). The Warsaw Convention has been amended, and the United States has ratified the amendments in part.

[4] Airbills are referred to as "air waybills" by some air carriers.

[5] A "freight forwarder" is "[a] person or company whose business is to receive and ship goods for others." BLACK'S LAW DICTIONARY at 64 (7th ed. 1999).

shipper." *St. Paul & Pac. R. Co. v. Acme Fast Freight, Inc.*, 336 U.S. 465, 487, 69 S. Ct. 692, 702, 93 L. Ed. 817 (1949) (citing *Interstate Commerce Comm'n v. Delaware, Lackawanna, & W. R. Co.*, 220 U.S. 235, 31 S. Ct. 392, 55 L. Ed. 448 (1911)). Common carriers cannot "sit in judgment on the title of the prospective shipper," *Delaware, Lackawanna*, 220 U.S. at 252, 31 S. Ct. at 398, or "scrutinize ownership of the cargo" before accepting it for shipment, *Nippon Fire & Marine Ins. Co., Ltd. v. Skyway Freight Sys., Inc.*, 235 F.3d 53, 61 (2d Cir. 2000).[6] Therefore, common carriers are entitled to assume that a shipper who tenders goods is authorized to form a contract of carriage and to agree to its attendant terms and conditions. *Id.* at 62 n.4 (citing *Nippon Fire & Marine Ins. Co., Ltd. v. Skyway Freight Sys., Inc.*, 45 F. Supp. 2d 288, 293-94 (S.D.N.Y. 1999); *Hampton v. Federal Express Corp.*, 917 F.2d 1119, 1125-26 (8th Cir. 1990)).

The ATA is concerned that the decision below could be read to alter these settled expectations. Specifically, the decision below might be read to suggest that a shipper may avoid the liability limitations in a carriage contract between a forwarder and a common carrier by asserting that it was not a party to the contract and therefore is not bound by it. Such a reading is unsustainable under basic carriage law and must not be permitted to stand.

To avoid any uncertainty, the Court should correct the decision below in either of two ways. First, it could reverse,

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[6] Such scrutiny is impractical because freight forwarders ship a substantial volume of cargo and intermediate air carriers may never deal directly with the owner of that cargo. Air carriers could not trace the title of that cargo, or any agreements as to liability for it, without severely impeding the flow of commerce.

as a matter of law, the holding of the court below that the freight forwarder ("ICC") acted only as a principal in contracting with the ocean carrier ("Hamburg Sud"). In that instance, the shipper's breach-of-contract claim would not be able to proceed unburdened by the terms and conditions contained in Hamburg Sud's bill of lading and accepted by ICC as agent for Kirby, the original shipper. Alternatively, the Court could uphold the determination that ICC acted only as a principal but make clear the inevitable consequence that Kirby could not maintain a breach-of-contract action against Norfolk Southern, with whom it had no contract.[7] Either of these holdings would safeguard the eminently reasonable expectation of an air carrier that the terms and conditions of its airbill will be enforced when it acts as an intermediate carrier, even if it lacks privity with the original shipper or consignor.

SUMMARY OF THE ARGUMENT

Regardless of whether ICC is determined to be an agent or a principal in its transaction with Kirby, Norfolk Southern's liability should be governed solely by the terms and conditions in its contract of carriage. The decision below implies that Kirby can both sue Norfolk Southern directly and be free from the Norfolk Southern's liability limitations. This implication cannot stand.

If Kirby did not contract with Norfolk Southern, either directly or through agents, then Kirby cannot sue Norfolk

[7] In the absence of a breach-of-contract action, Kirby has no action against Norfolk Southern at all, because Norfolk Southern did not assume any duties beyond those defined in the contract of carriage, including any duties to an unforeseeable plaintiff like Kirby. *See Nippon*, 235 F.3d at 62 n.4.

Southern for breach of contract. It is hornbook law that one may not maintain a breach-of-contract action without privity of contract with the defendant or, at the very least, the status of third-party beneficiary. The Court should not permit a contrary implication to stand.

Furthermore, the Court should make clear that, in the absence of a breach-of-contract action, Kirby has no claim against Norfolk Southern at all. A carrier's duties to a shipper are defined in its contract of carriage, and it assumes no duties beyond those defined, including any duties to unforeseeable plaintiffs. Therefore, Kirby can either sue Norfolk Southern for breach of contract, subject to the terms and conditions of the contract of carriage, or Kirby cannot sue Norfolk Southern at all.

ARGUMENT

1. The Court has before it a variety of arguments regarding on whose behalf ICC acted in this case when it contracted with Hamburg Sud. The Court must decide whether ICC was acting either as an agent of Kirby or as its own principal when placing Kirby's goods with another carrier. The ATA will not add to the amply briefed arguments seeking to answer this question. Instead, the ATA urges the Court to issue an opinion that makes the natural implications of its determination clear—regardless of how it decides the actual question of agency. Thus, if the Court determines that ICC was Kirby's agent, then it should also hold Kirby bound to Hamburg Sud's bill of lading. On the other hand, if the Court concludes that ICC acted as its own principal, then it should also hold that no breach-of-contract or tort action by Kirby will lie against Norfolk Southern.

2. If the Court determines that ICC contracted with Hamburg Sud on behalf of Kirby—*i.e.*, as Kirby's agent—then the Court should also conclude that Kirby is bound by the contract that ICC ultimately struck with Hamburg Sud. When an agency relationship exists, and an agent enters into a contract on behalf and with the authority of its principal, the principal is bound by the contract. *See* RESTATEMENT (SECOND) OF AGENCY § 144 ("A disclosed or partially disclosed principal is subject to liability upon contracts made by an agent acting within his authority if made in proper form and with the understanding that the principal is a party."); *id.* § 147 ("Unless otherwise agreed, a disclosed or partially disclosed principal is a party to a contract, if not negotiable or sealed, made by his agent within his authority."); *id.* § 186 ("An undisclosed principal is bound by contracts and conveyances made on his account by an agent acting within his authority, except that the principal is not bound by a contract which is under seal or which is negotiable, or upon a contract which excludes him."); *id.* § 190 ("An undisclosed principal may be liable upon a simple contract in writing, although it purports to be the contract of the agent."). Thus, when a principal brings a breach-of-contract action against a party that contracted with its agent, the principal is held to the terms and conditions of the contract.

Pursuant to these agency principles, then, ICC—if found to be an agent of Kirby—would have been able to bind Kirby to the terms and conditions of the contract with Hamburg Sud, which included, among other things, Hamburg Sud's Himalaya Clause and Clause Paramount. Such a conclusion would, of course, leave open the questions of (a) whether those clauses absolved Norfolk Southern of liability in this case and (b) the nature of Hamburg Sud's relationships with ICC, Norfolk Southern, and Kirby. The court below did not

consider, and, because of its holding, did not have occasion to consider, either of these questions. But, however these questions are resolved, it should be clear that, unless Kirby's agent (or a subagent of its agent) bound Kirby to a contract with Norfolk Southern, Kirby cannot bring a breach-of-contract action against Norfolk Southern.

3. If no agent bound Kirby to a contract with Norfolk Southern, then Kirby cannot file a breach-of-contract action directly against Norfolk Southern. The most axiomatic of contract principles requires that some kind of contract—express or implied, oral or written—must exist between two parties before one can sue the other for breach of contract. *See, e.g.*, *Johnson v. All Am. Life Ins. Co.*, 838 F. Supp. 1556, 1559 (M.D. Fla. 1993); *McCulley Fine Arts Gallery, Inc. v. X Partners*, 860 S.W.2d 473, 476-77 (Tex. Ct. App. 1993). When there is no such contract between the parties themselves—when they lack "privity of contract"—they cannot sue each other for breach of contract. *See* BLACK'S LAW DICTIONARY 1217 (7th ed. 1999) (defining "privity of contract" as "[t]he relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so.").

In this case, Norfolk Southern did not contract with Kirby itself. If Norfolk Southern also did not contract with an agent of Kirby, then no breach-of-contract action can possibly lie between Kirby and Norfolk Southern. In the absence of any agency relationships, Kirby can only sue ICC for breach of contract because Kirby only had a contract with ICC. If ICC is found liable, it might then recover against Hamburg Sud based on their contract, and so on down the line. While this series of suits may ultimately lead to a breach-of-contract action against Norfolk Southern, Kirby will never be the plaintiff in such an action. *See, e.g.*, *Pierce Assocs., Inc. v.*

Nemours Foundation, 865 F.2d 530, 535-36 (3d Cir. 1989) (describing the effect of a lack of privity in the construction context, which is to restrict owners to suing general contractors and bar them from suing subcontractors).[8] Accordingly, if the Court determines that Norfolk Southern contracted with neither Kirby nor its agent or subagent, as the court below apparently determined, then it should reverse the decision below to the extent that decision implies the existence

[8] Kirby might be able to sue Norfolk Southern directly for breach of contract if it could demonstrate that Kirby was the intended third-party beneficiary of whatever contract Norfolk Southern formed for carriage of the shipment. *See* RESTATEMENT (SECOND) OF CONTRACTS § 304. But the decision below reflects no consideration of this argument, and the Court should not consider it in the first instance. Even when such arguments are made, they require shippers and consignors to show that they are third-party beneficiaries intended by the contracting parties, and not merely incidental beneficiaries of the contract. *See id.* Such a showing should not be possible when an intermediate carrier is not even aware of the initial shipper or consignor's existence or identity. *See, e.g., Neal v. Republic Airlines, Inc.*, 605 F. Supp. 1145, 1150 (N.D. Ill. 1985) ("With Republic [Airlines] having no specific awareness of plaintiffs' existence or of their interest in the contract, it is wholly implausible to conclude that they were intended beneficiaries. At most they were incidental beneficiaries of Republic's performance and as such have no right to sue."). More fundamentally, pursuit of third-party-beneficiary status would not advance the case of a shipper or consignor seeking relief beyond that permitted by the applicable contract for carriage. As a third-party beneficiary of the carriage contract, the shipper or consignor would also be subject to the contract's limits on liability. *See, e.g., Gen'l Ins. Co. of Am. v. Interstate Serv. Co., Inc.*, 701 A.2d 1213, 1218 (Md. Ct. App. 1997) ("Under Virginia law, an intended third-party beneficiary to a contract is entitled to enforce the terms of the contract and is subject to all defenses arising out of the contract.").

of a valid breach-of-contract claim by Kirby against Norfolk Southern.

4. The court should also make clear that, in the absence of a breach-of-contract action against Norfolk-Southern, Kirby has no action at all. Under long-standing principles of carriage law, a carrier's liability limitations "limit recovery not only for breach of contract, but also based on other legal theories, including negligence, bailment, or conversion." *Nippon*, 235 F.3d at 60. As a result, a shipper "may not, by recasting the form of action, escape the effect of a valid stipulation restricting liability to the declared valuation." *Neal v. Republic Airlines, Inc.*, 605 F. Supp. 1145, 1148 (N.D. Ill. 1985) (citing *Young v. Delta Air Lines, Inc.*, 432 N.Y.S.2d 390 (N.Y. App. Div. 1980)).

When seeking to recover against an intermediate carrier, then, a shipper may not proceed in tort; instead, the shipper "must proceed, if at all, on a breach of contract theory." *Neal*, 605 F. Supp. at 1148. A shipper may pursue a breach-of-contract claim as a party to the contract—either through agency or privity principles—or as a third-party beneficiary of the contract. If the shipper cannot claim breach of contract as either a party or as a third-party beneficiary, however, then the shipper simply has no claim against the intermediate carrier at all. *Neal*, 605 F. Supp. at 1150 (dismissing plaintiff's breach-of-contract claim—the only claim allowed to go forward—for lack of privity).

This principle of carriage law—that carriers may be sued only for breaches of their carriage contracts—is consistent with the general rule that "'a tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was due to the negligent or intentional conduct of that party,

when injury resulting from the breach is damage to the subject matter of the contract.'" *Holden Farms, Inc. v. Hog Slat, Inc.*, 347 F.3d 1055, 1061 (8th Cir. 2003) (quoting *Spillman v. American Homes*, 422 S.E.2d 740, 741-42 (N.C. Ct. App. 1992)). Both the carriage principle and the general rule recognize that, when a carrier accepts a shipment, any duty to deliver the shipment, undamaged or otherwise, arises only out of its contract for carriage, and liability in excess of that contract's limits, or to parties not contemplated by that contract, is unforeseeable and baseless. *See, e.g., Nippon*, 235 F.3d at 62 n.4. If Kirby cannot proceed against Norfolk Southern for breach-of-contract, then it cannot proceed against Norfolk Southern at all, and the Court should reverse the decision below to the extent that it holds otherwise.[9]

5. Allowing Kirby to proceed under a breach-of-contract theory, or not at all, best enforces the reasonable expectations of the parties to a carriage transaction. Based on longstanding principles of carriage law, Norfolk Southern expected its liability for the shipment at issue to be limited by the terms to which it agreed, and Norfolk Southern set its rates accordingly. But, as the United States has pointed out, the liability that Norfolk Southern now confronts is inconsistent

[9] In addition to the protections afforded by these principles of carriage law, air carriers who serve as intermediate carriers under their own airbills are further protected from extra-contractual tort actions by the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. § 41713(b)(1). *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995) (holding that the ADA preempts all state-law actions relating the prices, routes or services of airlines except breach-of-contract actions seeking to enforce self-imposed obligations of airlines). For international air carriage, recovery will be limited by the Warsaw Convention. *See, e.g., Banihashemrad v. Lufthansa Cargo AG*, 28 F. Supp. 2d 1014 (W.D. Tex. 1998).

with both its expectations and its rates. U.S. Br. 18-19. The Court should reverse the decision below for this reason alone.

But the decision of the court below actually upsets even Kirby's expectations. It is a longstanding principle of common carriage law that passengers, shippers, and consignors should expect to be bound to reasonable terms and conditions of which they have notice in a passenger ticket, cargo airbill, bill of lading, or other shipping document. *See, e.g., Deiro v. Am. Airlines, Inc.*, 816 F.2d 1360, 1363-66 (9th Cir. 1987) (holding a passenger to baggage liability limitations noticed on the passenger's ticket). Passengers, shippers, and consignors who have agreed to liability limitations have no reason to expect a recovery beyond those limitations; insurers who are subrogated to their rights have even less expectation of such a recovery.

Because, in its contract with ICC, Kirby did not declare the full value of its shipment or pay the corresponding rate, Kirby should not have expected that—in the event of loss, damage, or delay—it would be able to recover the full value of its shipment from anyone. That Kirby anticipated such a limited recovery is evidenced by the fact that it arranged for insurance. But the decision below has given Kirby's insurer a windfall: a release from liability limits for which Kirby neither contracted nor paid. Through this windfall, the insurer is being permitted to evade the very risk for which it contracted to indemnify Kirby.

A rule that frees Kirby from the liability limits for which it contracted does not place the burden of assessing the risks associated with a shipment on the party best equipped to deal with them. The ATA joins with Norfolk Southern, the United States, and other industry *amici* in urging the Court's reversal of such a rule.

CONCLUSION

The settled expectations of the ATA and its members could be unfairly upset by an indirect implication of the decision below: that a shipper is able to sue an intermediate carrier directly but free from the terms and conditions of the contract under which the carrier agreed to ship. The ATA asks the Court to ensure that this mistaken implication does not obtain a foothold by reversing the decision below.

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MAY 2 3 2003

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

JAMES N. KIRBY PTY LIMITED d/b/a KIRBY ENGINEERING and ALLIANZ AUSTRALIA LIMITED,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS, THE LONDON JOINT CARGO COMMITTEE AND THE INSURANCE COUNCIL OF AUSTRALIA AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS

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The American Institute of Marine Underwriters ("AIMU"), the London Joint Cargo Committee ("JCC") and the Insurance Council of Australia ("ICA") (referred to herein collectively as "Underwriters") respectfully submit this brief as *amici curiae* in support of Respondents.

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

AIMU, a non-profit association, represents 44 United States insurance companies which underwrite about 90 percent of the marine risks insured in this country. In 2003, AIMU's members underwrote marine insurance policies with collective premiums of more than $1.8 billion. The insured value of the goods and vessels insured under these policies totaled hundreds of billions of dollars. More than a third of those premiums and insured values were for cargo shipped in United States foreign trade, including through multimodal shipments such as the one involved in this case.

The JCC represents the interests of both Lloyd's syndicates[2] and major insurance companies[3] which write

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1. Pursuant to Rule 37.2 (a), letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici curiae* state that no person or entity other than *amici curiae* has made a monetary contribution to the preparation of this brief, and no counsel for a party has written this brief in whole or in part.

2. Lloyd's of London is a leading insurance market providing specialist insurance services to businesses in more than 189 countries. In 2004, 66 syndicates are underwriting insurance at Lloyd's.

3. These companies are also represented by the International Underwriting Association of London, which is the world's largest representative organization for international and wholesale insurance companies.

international cargo business from within the United Kingdom. Members of the JCC include senior cargo underwriters from the Lloyd's insurance market and from insurance companies based in London, through the International Underwriting Association ("IUA"). The JCC also includes representation from the UK Company market operating outside London.

Although it is difficult to identify accurately the level of involvement of JCC members and those it represents in terms of international insurance transactions, the JCC is widely recognized globally as a highly influential, authoritative body in the field of goods in transit insurance. The JCC produces model clauses for use by cargo insurers in London and internationally; it also monitors developments in the shipping and transport industry that may impact the underwriting of this class of business. JCC acts as a focal point for the discussion of relevant issues with other overseas insurance markets, insurance brokers and client bodies. In 2002 (the most recent year for which collective data is available), Lloyd's underwriters and IUA companies underwrote marine insurance policies with collective premiums of just over $2 billion. (This does not include the UK company market operating outside London.) More than 20% of that amount represented insurance of goods in transit.

The ICA is the representative body of the general insurance industry in Australia. ICA's 61 members account for more than 90 percent of total premium income written by private sector general insurers in Australia. Recently published statistics from the Australian Prudential Regulation Authority show that the private sector insurance industry in Australia, which employs about 25,000 people, generates direct premium revenue of approximately $20 billion

annually. ICA members issue roughly 38 million insurance policies and deal with 3.5 million claims each year. Marine insurance policies underwritten by ICA members account for approximately $189 million in premiums, of which approximately $110 million relates to transport and cargo insurance.

AIMU, on behalf of its members, works in cooperation with the United States government and international bodies to improve the legal environment for this business. The JCC works similarly in the United Kingdom and internationally as does the ICA in Australia through its Marine Standing Committee. (For example, the ICA was involved in amendments to the cargo liability regime set forth in the Australian Carriage of Goods Act in 1997.)

AIMU has consistently been involved in the establishment and development of the cargo liability regime in the United States. That involvement extends from AIMU's participation in shaping the United States Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. §§ 1300-1315, in the 1920's and 1930's to the efforts in the United States to reform COGSA in the 1990's and to the current United Nations Commission on International Trade Law ("UNCITRAL") project to establish an international cargo liability regime. AIMU also has provided its views on these issues to courts, including through the filing of an amicus brief with this Court in *Robert C. Herd & Co., Inc. v. Krawill Mach. Corp.*, 359 U.S. 297 (1959), a case that for almost half a century has provided the doctrinal foundation in this country on the enforceability of Himalaya clauses.

This brief focuses on the second question presented in the petition for a writ of certiorari.[4] To the marine insurance industry, the proper scope of Himalaya clauses in multimodal carriage is of critical importance. It determines the extent to which insurers can recover, through subrogation actions, for losses suffered by their insureds. The adoption of Petitioner's position would establish, in effect, a system allowing any performing party in a multimodal carriage — no matter how far inland or attenuated to maritime activity — to invoke the considerably lower sea carriage liability limits whenever that party negligently damages goods. For that reason, *amici* have a substantial interest in the proper resolution by this Court of this appeal.

SUMMARY OF ARGUMENT

This case involves admiralty law, Himalaya clauses and the apportionment of liability for loss in international, multimodal cargo transport. *Amici* view the commercial issues here presented as being justly settled since this Court last entered this area 45 years ago. *Amici's* point of view is that there is no sound reason for changing established law, as Petitioner proposes.

First, the common law principles of contract construction that have long provided the basis of judicial interpretations

4. Question 2 is as follows:

> Whether federal maritime law requires that terms of a bill of lading extending liability limitations under [COGSA], to "independent contractors" used to perform the contract of transportation must be narrowly construed to cover only those independent contractors in privity of contract with the bill's issuer.

of Himalaya clauses have not lost their currency. Exculpatory clauses in form contracts of adhesion are to be clearly stated, and narrowly construed against the drafter. Any intention to extend to third parties benefits that are granted to the contracting parties must likewise be clearly expressed, and must indicate a well-defined class of readily identifiable persons to whom the benefits are extended. Lacking such clearly expressed coverage, those who are not signatories to the contract may not avail themselves of others' exculpatory provisions. Petitioner's position gives vague words that are routinely included in Himalaya clauses the broadest possible meaning, even though much more precise language can be, and often is, included when the carrier intends to benefit inland carriers.

Second, Petitioner's position is commercially unreasonable and unwise. Petitioner demonstrably never relied on the coverage it now asserts, and thus would receive a windfall if its position is adopted. Curtailing the ability of marine cargo insurers to recover damages from negligent inland carriers, as Petitioner urges the Court to do, would result in a drastic reapportionment of liability concepts within the shipping industry, for no apparent purpose. Shippers' insurance premiums will necessarily rise. *Amici* believe that existing legal rules of risk-sharing reflect a sensible, fair balance, constantly being fine-tuned by national and international regulatory bodies and the admiralty bar. It denies a contractual free ride to negligent non-parties, who of course can obtain their own insurance. There is simply no showing of any good reason, in law or equity, for this Court to step into a nonexistent breach.

ARGUMENT

I. The Decision Below Upholds Properly Settled Expectations And Contract Rights

The ruling below is in accord with the unanimous holdings of every court of appeals decision to address whether a Himalaya clause in a maritime bill of lading affords protection to an inland carrier. *See* Pet. App. 15a; *Caterpillar Overseas, S.A. v. Marine Transp., Inc.* 900 F.2d 714, 725-26 (4th Cir. 1990); *De Laval Turbine, Inc. v. West India Indus., Inc.*, 502 F.2d 259, 269-70 (3d Cir. 1974). Adherence to that well-settled precedent contributes to the consistency and clarity that Underwriters seek regarding legal rules in their area of operations. Clear, dependable rules better enable Underwriters to provide efficient, fairly priced service to the shipping industry. In pricing their policies, Underwriters rely on their refined ability to project, based on precedent, how much they may recover from responsible third parties for many types of losses. This process benefits the insured too because the projection of recoveries from responsible third parties leads to reduced premiums.

Recovery actions keep premiums low in two ways. They enable insurers to hold down their premiums by reducing the insurers' net payments on claims. The fact that such actions can be brought provides an incentive for responsible parties to avoid negligence, thus reducing losses and further contributing to insurers' ability to maintain premiums at affordable levels.

These anticipated recoveries include the one sought here from Petitioner. In thousands of insurance policies currently in force, the insurers underwrote (and priced) risks based on

the expectation that they would be able to make recoveries from responsible third parties. These well-founded expectations will be pointlessly dashed if the Court adopts Petitioner's arguments, abandons longstanding precedent that has created certainty for insuring carriage of goods, and allows every party involved in a multimodal shipment to limit its liability, regardless of its relationship with, or identification to, the shipper.

II. The Contract At Issue In This Case Was Properly Enforced By The Court Below

This case involves a contract of carriage between an owner of cargo in Australia (Kirby) and a freight forwarder named ICC. ICC, acting as a non-vessel operating carrier ("NVOC"), issued the bill of lading to the shipper Kirby. This bill of lading is the only contract in this case to which Kirby was a party and it evidences the contract of carriage entered into between Kirby and ICC.

This contract purported to extend the benefit of ICC's liability limit, via a Himalaya clause, to "any servant, agent or other person including any independent contractors whose services have been used to perform the contract." Underwriters agree with the court below that Petitioner was outside the scope of this Himalaya clause and that Petitioner may therefore not limit its liability based on the ICC-Kirby bill of lading.

There are two reasons for this. First, because Petitioner was not in privity of contract with ICC, the Himalaya clause in the ICC-Kirby bill of lading does not apply to limit Petitioner's liability to Kirby. Second, the Himalaya clause in the ICC-Kirby bill of lading did not specify clearly enough

that the liability limit applicable to ICC would be extended to a subsequent inland carrier such as Petitioner. These requirements of privity and specificity are and should remain matters of settled commercial jurisprudence. In deciding the Himalaya clause issue on both grounds — each of which constitutes an independent holding — the Eleventh Circuit adhered to the great weight of circuit precedent in denying inland carriers the benefits of a vaguely worded Himalaya clause in a bill of lading issued by a carrier with whom it is not in privity of contract.

A. Himalaya Clauses Must Be Strictly Construed, as the Court Below Properly Did

Contracts that purport to curtail liability are, under familiar principles, to be narrowly construed. Professor Williston's treatise provides the basic rule:

> Exculpatory clauses generally fall within the rule that since they are not favored, they are strictly construed. . . . In addition to construing even the most clear and unambiguous exculpatory provisions strictly against the party seeking the benefit of the clause, the courts will often inquire as well into whether the liability at issue was unambiguously disclaimed in the first instance.

11 S. WILLISTON & R. A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 32:20 (4th ed. 1999) (citing *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955)). In *Herd*, this Court stated that,

> . . . contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries, for they "are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties."[5]

Thus, the Himalaya clause in the ICC-Kirby bill of lading was properly interpreted narrowly by the court below.

Bills of lading are also subject to general principles of contract construction. *EF Operating Corp. v. American Buildings*, 933 F.3d 1046, 1050 (3d Cir. 1993). As a contract of adhesion, the bill of lading is strictly construed against the carrier.[6] *Id.*; *Mitsui & Co. v. American Exp. Lines, Inc.*, 636 F.2d 807, 822-823 (2d Cir. 1981) (Friendly, J.). This same concern applies with even greater force when a limitation of liability clause is being invoked by a carrier that is not even a party to the bill of lading or a subcontractor of the bill's issuer.

It has followed that any "intent to extend COGSA benefits to third parties must be clearly expressed." *Taisho*

5. 359 U.S. at 305 (quoting *Boston Metals Co. v. The Winding Gulf*, 349 U.S. 122, 123-24 (1955) (Frankfurter, J., concurring)).

6. Petitioner argues that the rule of strict construction only applies when there is an ambiguous limitations clause. Pet. Br. at 42. That proposition does not help Petitioner, however. The ICC Himalaya clause clearly does not extend by its own terms to inland carriers, by contrast with the more explicitly worded ocean carrier's bill of lading. To the extent there is any ambiguity in understanding the relational terms "servant, agent, or other person including independent contractor," that ambiguity must be construed against Petitioner.

Marine & Fire Ins. Co. v. The Vessel Gladiolus, 762 F.2d 1364 (9th Cir. 1985) (Kennedy, J.). *Accord: De Laval Turbine*, 502 F.2d at 264; *Cabot Corp. v. S.S. Mormacscan*, 441 F.2d 476, 478-79 (2d Cir.), *cert. denied*, 404 U.S. 855 (1971).

Therefore,

> [w]hen a party seeking protection under a Himalaya Clause is not specifically mentioned therein, the party should, at a minimum, be included in a well-defined class of readily identifiable persons to which COGSA benefits are extended under the terms of the clause.

Taisho Marine, 762 F.2d at 1367, citing *Rupp v. Int'l Terminal Operating Co.*, 479 F.2d 674, 677-78 (2d Cir. 1973), and *Cabot*, 441 F.2d at 478-79.[7] Each of the foregoing courts — from the oft-quoted Second Circuit's opinions in *Cabot* and *Rupp* to then-Judge Kennedy's opinion in *Taisho Marine* — has followed the same interpretive principles as applied by the Eleventh Circuit in this case.

Although Petitioner appears to accept those principles, it never applies them to the present facts. If it did, it would be unable to demonstrate how an inland carrier without privity could possibly be within the "well defined class of beneficiaries" contemplated in the generic language of "any agent, servant or other person including independent contractor." Petitioner's reliance on such broad contractual

7. Other federal appellate courts have relied on these two Second Circuit cases, *Rupp* and *Cabot*, for the proposition that any intent to extend liability to third persons must be clearly expressed. *E.g.*, *La Salle Mach. Tool, Inc. v. Maher Terminals, Inc.*, 611 F.2d 56, 59 (4th Cir. 1979); *De Laval Turbine*, 502 F.2d at 264, 267.

language ignores the reality that maritime contracts have evolved in the wake of *Herd* and subsequent judicial decisions. Reassessing the risks of loss and the potential for bringing subrogation actions, carriers have refined the terms of Himalaya clauses, where appropriate. Increasingly, some market actors' response to consistently applied strict construction principles has been to specify which third parties will be included in Himalaya clauses.

For example, two decades ago, the Himalaya Clause Subcommittee of the United States Maritime Law Association's Committee on Stevedoring and Terminal Operations suggested that in an effective Himalaya clause, "Stevedore, terminal operators and other third parties should be specifically mentioned in the Himalaya Clause in order to ensure that the protection of COGSA will be extended to them." MLA document no. 652, pp. 7895, 7902 n.3 (April 1984). The MLA report explained: "Although a few early cases held that COGSA's limitations could be extended to stevedores by language in Himalaya clauses referring only to 'independent contractors' . . . the modern trend is moving toward a requirement of greater specificity." *Id.* at 7903. The report concluded that "the best guarantee of this result [*i.e.*, protecting stevedores and terminal operators] is the mention of stevedores and terminal operators by name in the Himalaya clause." *Id.* at 7904.

Similarly, *The Merchants Guide*, which is widely available in the shipping industry, provides effective language to protect rail carriers, language that was not contained in the ICC-Kirby bill of lading. *The Merchants Guide* (Int'l Ed. 1995) (P&O Nedlloyd). Recommendations such as this demonstrate that the maritime bar and its clients have long known that it is essential, in light of the strict construction

principle, to include specific language in a bill of lading if there is a desire to have it apply to parties other than those customarily covered by Himalaya clauses (such as those that do not have their own liability regime, *e.g.*, stevedores and terminal operators). No one can justifiably *assume* that a Himalaya clause is intended to go beyond maritime parties to protect inland carriers. Any intent to achieve that result must be demonstrated by very clear language.[8]

B. Petitioner May Not Avail Itself of the Limit of Liability in a Contract to Which It Was Not a Party

In applying the strict construction principle, the Eleventh Circuit first correctly held that the Himalaya clause in the ICC-Kirby bill of lading did not extend to Petitioner because Petitioner was nether a party to the ICC-Kirby bill of lading nor an independent contractor of ICC. In fact, Petitioner was two contracts removed from that bill of lading; it was a sub-subcontractor of ICC. Under these circumstances, Petitioner is not entitled to any limitation of liability provided in the ICC-Kirby bill of lading. That position has been well established over the years in court of appeals precedent that

8. The MLA report also advises on what to do to protect sub-subcontractors under COGSA. Its model Himalaya clause includes the following phrase:

> It is further agreed that the expression "servant, agent or independent contractor" in this Bill of Lading shall include direct and indirect servants, agents and independent contractors of the Carrier, as well as their respective "servants, agents or independent contractors."

Id. at 7902, ¶4, 7904 n.4. Of course such language was lacking in the ICC-Kirby bill of lading.

has helped Underwriters attain the certainty they need to establish affordable, consistent premiums for cargo interests and carriers alike.

In *Mikinberg v. Baltic Steamship Co.*, 988 F.2d 327 (2d Cir. 1993), for example, the court held that a Himalaya clause does not apply unless there is "contractual privity" between the parties. Otherwise, COGSA protections would be extended to "indefinite and unforeseeable defendants who may have only an attenuated connection to the 'carriage of goods by sea.'" *Id.* at 333.[9] The privity requirement reflects an established, sensible apportionment of risk. For years, insurers, when underwriting cargo in international trade, have taken into consideration their ability to recover from responsible third parties who are not in privity with a shipper.

The decision below confirms this ability. If this avenue of recovery were now closed, as Petitioner urges, the parties' settled expectations in entering into thousands of contracts currently in force would be upset. Moreover, insurers would have to reevaluate and re-price their policies covering such

9. *Akiyama Corp. of America v. M.V. Hanjin Marseilles*, 162 F.3d 571, 573 (9th Cir. 1998), as the Eleventh Circuit noted below, rejected a privity requirement as applied to the bill of lading there, presumably because the bill's terms expressly included persons who were not in privity with the carrier. Instead, the court focused on comparing the nature of the services performed by the party who seeks to invoke the Himalaya clause compared to the carrier's responsibility under the carriage contract. Pet. App. 13a. Because the court in *Akiyama* expressly quoted the language of *Taisho Marine* and other Ninth Circuit cases to the effect that the parties' "contractual relation" is one factor for the court to consider, 162 F.3d at 573, it cannot be said that *Akiyama* categorically disavows the importance of contractual privity.

cargo, with little to guide their decisions about potential recoveries. Petitioner offers no sound reason for upsetting this long-established commercial understanding.

The privity requirement also is embodied in the language of this Himalaya clause. Construing the phrase "agent, servant or . . . independent contractor" necessitates asking *whose* agent, servant or independent contractor. It cannot be that the quoted language refers to *everyone's* employee, agent or independent contractor no matter where found or how attenuated its relation to the carrier that issues the bill of lading. The terms "agent," "servant" and "independent contractor" must refer to a non-party's relationship to the issuing carrier — *i.e.*, the would-be beneficiary must be the *carrier's* "agent" or the *carrier's* "independent contractor." If that were not the intended result, the drafters of the bill of lading could have simply written "all persons who participate in the carriage of the goods in any way to their end destination." By instead choosing understood common law relational terms, the drafters of this bill of lading necessarily intended that someone claiming the benefit of the Himalaya clause must be in a contractual relationship with the issuing carrier.

C. Petitioner May Not Avail Itself of a Limit of Liability in a Contract That Does Not Specifically Identify It as a Beneficiary

The second independent basis on which the Eleventh Circuit denied Petitioner coverage under the ICC Himalaya clause was that this clause did not adequately specify Petitioner as an "inland carrier" so that Petitioner could avail itself of any limitation of liability provided in that bill of lading. *See Taisho Marine*, 762 F.2d at 1367. This Court

should "not stretch the language when the party drafting . . . a form contract has not included a provision it easily might have." *Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 183 (1959).

Although Petitioner did not raise this issue in its petition for a writ of certiorari, and thus it is not properly before this Court, it was by itself an adequate basis to support the decision of the court below, and one that is supported by a wealth of decisions. *See, e.g., Herd*, 359 U.S. at 302-303; *Taisho Marine*, 762 F.2d at 1367. Thus, even if this Court were to agree with Petitioner's argument on the Himalaya clause issue as worded in its petition for a writ of certiorari, such a ruling would have no real consequence: the Eleventh Circuit's alternate holding based on the lack of specificity in failing to include a reference to "inland carriers" would still deny Petitioner relief. There is no reason for this Court to engage in the kind of advisory decision-making Petitioner seeks.

III. Petitioner Seeks An Unwarranted Windfall Through A Commercially Unreasonable Interpretation

The universe of non-maritime service providers involved in modern multimodal shipments, such as freight forwarders and inland carriers, is extensive. Unless the shipping contracts clearly identify the entities being protected, would-be free riders (such as Petitioner and others involved in inland carriage) could escape all but the minimal liability that Congress provided for ocean carriers in COGSA. *See Caterpillar Overseas*, 900 F.2d at 726.

If Petitioner were allowed to limit its liability to the shipper, based on language in a contract to which it is not a

party, its liability would amount to only a small fraction of the damage it caused — indeed so small an amount (less than one-third of one percent) that Petitioner might just as well be completely exonerated for its negligence. That such substantial windfalls may occur is illustrated here by the apparent fact that no entity other than Petitioner had anything to do with the train derailment. As the Second Circuit observed in *Mikinberg*, "any transporter in the flow of commerce would be automatically protected by a single bill of lading regardless of its contractual privity with the carrier or shipper." 988 F.2d at 333.

Petitioner's position is commercially unreasonable. Petitioner is seeking the benefit of the limit of liability in the ICC-Kirby bill of lading after the fact. However, it could not have reasonably relied on that limit prior to its performance because Petitioner was unaware of the limit, or any other terms in that contract. After the derailment, Petitioner denied Kirby a recovery on the ground that Kirby was not a contracting party to Petitioner's Rail Circular. *See* Resp. Brief in Opposition to Certiorari at 19. Petitioner did not invoke the ICC Himalaya clause then, because it had no reasonable expectation that this provision had any application at all to limit Petitioner's liability.

Moreover, Petitioner's *own form contract* (which was used with the ocean carrier in this case) provides for a substantially higher limit of liability than does the ICC-Kirby bill of lading. Petitioner publishes on the Internet an Intermodal Rail Circular (the "Circular") that states, in the manner of a form contract, its terms of shipment. http://www.nscorp.com/intermodal/ShowDoc/english/intermodal/system_information/general/intermodal_rules_circular.pdf. Under paragraph 8.3(e), Petitioner limits its liability for

intermodal container shipments to the lesser of the destination value of the goods or $250,000 per container. The current Circular was not in effect at the time of Kirby's shipment, but the $250,000 limit was. Thus, assuming a shipper inquired about what Petitioner agreed to pay in the event of loss — and the Circular itself requires anyone shipping cargo with Petitioner to make themselves aware of Petitioner's terms of carriage — it would have been reassured by Petitioner's own limits, which would have more than amply covered the total loss sustained by Kirby and its insurer. Petitioner also undertakes in paragraph 8.2 to pay its share of losses attributable to its negligence.

The Circular makes clear the understanding of the parties. First, Petitioner could not have been relying on the maritime $500 package limitation (set forth in COGSA), because its Circular makes it liable for up to $250,000 per container for its negligence. Indeed, in its immediate response to the derailment, Petitioner invoked only the Circular (including the $250,000 limit), which indicates that its subsequent invoking of the $500 package limitation was likely an invention of counsel. Second, nothing in the paragraph of the Circular that sets forth the liability limits (¶ 8.3(e)) ties those limits to a declaration of value for the goods. Thus, Petitioner's theory of reasonable reliance — that it "relied' on the absence of declared value for the goods by Kirby — is belied by the terms of its own Circular pursuant to which Petitioner carried the goods. Third, Petitioner has not revised its Circular during this litigation to alter its limitation amounts or otherwise tie its liability limits to those of ocean carriers. Presumably, if Petitioner's argument in this Court reflected corporate policy, Petitioner would have altered its Circular to clarify the circumstances in which it is liable in international multimodal shipments, in light of the decision

of the Eleventh Circuit, where Petitioner has its headquarters. Any argument, therefore, that Petitioner relied on different liability limits in setting its rates is fanciful.

The freight charges Petitioner collected for its transportation services should have compensated it for the risk of causing cargo damage during the course of its services. Of course, Petitioner could have (and may well have) purchased liability insurance to protect it in the event it caused damage to the cargo during the course of performing its transportation services, just as Kirby purchased insurance to protect it in the event of damage to its goods. Thus, a ruling in Petitioner's favor would give it a substantial windfall.

Allianz, on the other hand, receives no windfall at all from a ruling in Respondents' favor. Rather it would be deprived of an avenue of recovery which for good reason it *did* reasonably expect would exist when it entered into the insurance contract with Kirby covering this cargo. Allianz (and its predecessor in interest in this matter) would have insured the cargo on the expectation that a loss or damage at sea would be subject to the very low limits of COGSA. But because sea voyage losses are relatively rare (compared to rail and truck carriage), Allianz would have set its premium in the expectation that the most significant risk of loss would occur on the inland portion of the journey, where Petitioner's Circular would more than make up for a complete loss. It would also have set its premium in the expectation that it would be permitted to recover for that inland loss through a subrogation action.

As with many insurance issues, any reapportionment of established liability concepts will result in premium

adjustments. Marine cargo insurers determine premiums in part to reflect a historically based likelihood of recovery through subrogation from responsible third parties who are not identified as beneficiaries of limits of liability contained in contracts to which the shipper is a party. Cargo insurers employ personnel specialized in recovery who probe each case for possible grounds on which to recoup claims paid. Underwriters collect hundreds of millions of dollars in such recoveries each year. If they did not, insurance premiums would increase.

Shippers such as Kirby regularly choose to purchase cargo insurance rather than declare the full value of the cargo and pay a higher freight rate. This choice cannot be interpreted as a surrender of the shipper's rights to recover for loss or damage beyond the liability limit stated in the shipping contract. Shippers often conclude that, for them, seeking recovery through litigation for cargo loss or damage from carriers is too uncertain and lengthy a process.[10] Thus, shippers purchase their own cargo insurance in order to obtain predictable, prompt payment for their loss, and leave it to their insurer to pursue recovery against the appropriate party or parties through subrogation claims.

There is no void into which the Court needs to step to right matters and no unfairness it needs to correct. Regulatory bodies within government and the shipping industry regularly revisit issues of the appropriate limits of liability of which this case provides one example. The body of national and international laws on the subject of liability for cargo loss and damage is currently being addressed at the United

10. When this case is argued, it will have been seven years since Petitioner damaged Kirby's cargo, and it still has not paid anything in compensation for that damage.

Nations, where a new liability regime is being drafted. This work may produce a treaty that will be accepted by the United States and other nations.

For example, one issue in the drafting process is whether all carriers that participate in a multimodal shipment should be subject to the same liability regime. The American railroad and trucking industries have advised the State Department that they wish to be exempt from the proposed treaty. These industries apparently prefer to continue taking their chances on avoiding tort liability through individual contractual arrangements, rather than embrace a treaty which would impose on them minimum liability standards.

As this is occurring, Petitioner and its *amici* ask this Court, which has rarely addressed this topic, to jettison the standards calling for specificity and privity which are embodied in the decision of the court below and which have been relied upon by American exporters and importers and the insurers of their cargoes for at least 45 years. While the Congress and other entities with regulatory authority consider whether to change the law, however, there is no warrant for this Court to upset this precedent that has created settled, reasonable business expectations.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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In The
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

JAMES N. KIRBY PTY LIMITED D/B/A KIRBY ENGINEERING AND ALLIANZ AUSTRALIA LIMITED,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF *AMICUS CURIAE* OF AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, INC., ASSURANCEFORENINGEN GARD (GJENSIDIG), ASSURANCEFORENINGEN SKULD (GJENSIDIG), BRITANNIA STEAM SHIP INSURANCE ASSOCIATION LTD., JAPAN SHIPOWNERS' MUTUAL P&I ASSOCIATION, LONDON STEAM SHIP OWNERS MUTUAL INSURANCE ASSOCIATION LTD., NORTH OF ENGLAND PROTECTING AND INDEMNITY ASSOCIATION LTD., SHIPOWNERS' MUTUAL PROTECTION AND INDEMNITY ASSOCIATION (LUXEMBOURG), STANDARD STEAMSHIP OWNERS PROTECTION AND INDEMNITY ASSOCIATION (BERMUDA) LTD., STEAMSHIP MUTUAL UNDERWRITING ASSOCIATION (BERMUDA) LTD., SVERIGES ANGFARTYGS ASSURANS FORENING, UNITED KINGDOM MUTUAL STEAM SHIP ASSURANCE ASSOCIATION (BERMUDA) LTD., AND WEST OF ENGLAND SHIPOWNERS MUTUAL INSURANCE ASSOCIATION (LUXEMBOURG) IN SUPPORT OF PETITIONER

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American Steamship Owners Mutual Protection and Indemnity Association, Inc., Assuranceforeningen Gard (Gjensidig), Assuranceforeningen Skuld (Gjensidig), The Britannia Steam Ship Insurance Association Ltd., The Japan Shipowners' Mutual P&I Association, The London Steam Ship Owners Mutual Insurance Association Ltd., The North of England Protecting and Indemnity Association Ltd., The Shipowners' Mutual Protection and Indemnity Association (Luxembourg), The Standard Steamship Owners Protection and Indemnity Association (Bermuda) Ltd., The Steamship Mutual Underwriting Association (Bermuda) Ltd., Sveriges Angfartygs Assurans Forening, The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd., and The West of England Shipowners Mutual Insurance Association (Luxembourg) – together known as the International Group of Protection and Indemnity (P&I) Clubs (collectively referred to here as "*Amici* P&I Clubs") – respectfully submit this brief as *amici curiae* in support of Petitioner.

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici comprise thirteen mutual insurance associations known as "protection and indemnity clubs" (often abbreviated "P&I clubs."). P&I clubs are "associations of shipowners

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation and submission of this brief.

banded together to spread and absorb liabilities falling on their members." Grant Gillmore & Charles L. Black, Jr., THE LAW OF ADMIRALTY (2d ed. 1975); see also 2 Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW, at § 19-12 (4th ed. 2004) (for the history and function of P&I Clubs); Leslie J. Buglass, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES 386-418 (3d ed. 1991); T.G. Coghlin, *Protection & Indemnity Clubs*, 1984 LLOYD'S MAR. & COM. L. Q. 403, 405-11; Mark Tilley, *The Origin and Development of the Mutual Shipowners Protection & Indemnity Association*, 17 J. MAR. L. & COM. 261 (1986); Norman J. Ronneberg, Jr., *An Introduction to the Protection & Indemnity Clubs and the Marine Insurance They Provide*, 3 U.S.F. MAR. L.J. 1 (1991). The individual P&I Clubs as *amici curiae* here form together a trade association known as the International Group of P&I Clubs.

The members of *amici* are owners, operators, and charterers of ships of practically all maritime nations. The thirteen clubs represented here insure nearly ninety percent (90%) of the world's ocean-going ship tonnage. The P&I Clubs themselves are non-profit mutual organizations, insofar as member shipowners insure one another on an indemnity basis against a variety of third party liabilities relating to the use and operation of ships, particularly those risks not otherwise covered by a vessel's hull policy. One large class of such liability exposures is the loss of, or damage to, cargo. See Buglass, supra, at 410-11; John C. Moore, *Liability for Damage to Property Carried, to be Carried, or Which Has Been Carried*, 43 TUL. L. REV. 581, 582-83 (1969).

None of the *amici* here have any direct exposure for the risks incurred by Respondents in the shipment of its cargo on Petitioner's railway. *Amici* nonetheless have a vital interest in the proper interpretation of the legal standards under which liability may be imposed and the extent to which liability

limitation mechanisms under bills of lading, international commercial law, and United States law (under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. App. §§ 1300-1315 (2003)) are to be extended to the agents, contractors and vendors of the Clubs' shipowner members.

Amici P&I Clubs concur with the views expressed by the United States at the petition stage of this case, see Brief for the United States as Amicus Curiae ["U.S. Pet. Br."], at 18, that this matter can most likely be disposed of in Petitioner's favor based on a fair construction of the Himalaya Clause in the bill of lading concluded between Respondent, Kirby, and their freight forwarder, ICC (the "Kirby/ICC bill"). That bill was a through bill of lading providing for carriage from Sydney, Australia to Huntsville, Alabama, with the last leg of the transit clearly being intended by Kirby as including some means of inland transportation. The plain language of the Kirby/ICC bill permitted ICC to initiate a chain of contractors to effectuate the carriage of goods to Huntsville, Alabama.

No artificial attempt at imposing a privity of contract bar or a requirement for a specific enumeration of parties should prevent Norfolk Southern from enjoying the liability limits incorporated through the Kirby/ICC bill and COGSA. More importantly, any move to do so would have profoundly unsettling effects on international maritime commerce. If Himalaya Clauses are not to be given their natural and consequential effect in multimodal carriage contracts, it would require an extraordinary reordering of bills of lading and insurance arrangements. Subsequent carriers of goods (such as Norfolk Southern in this case) will be required to halt shipments, examine bills of lading, and then open direct negotiations with the shipper in order to effectuate carrier defenses or liability limits – all at great cost of time and expense for shippers, carriers, and the consuming public.

As an alternative ground of ruling, this Court could also rule in favor of Petitioner based on what is conceded by all parties to be an unambiguous Himalaya Clause found in the bill of lading concluded between ICC, Kirby's freight forwarder, and Hamburg Süd (the "ICC/Hamburg bill"), the vessel owner which carried the consignment on its first ocean leg. The issue to be considered by the Court here, see Pet. Cert. (i) (Question 1); U.S. Pet. Br. (I), is whether ICC was acting as an agent for Kirby in procuring carriage of goods to Huntsville, Alabama, in which case Kirby would be bound by its terms.

Although any distinction between a freight forwarder's role as a principal or an agent is a factually-nuanced matter, *Amici* P&I Clubs would submit that it should be presumed in cases such as this that a freight forwarder or a non-vessel-operating common carrier (NVOCC), within the meaning of federal statutes on point, see 46 U.S.C. App. § 1702(17)(B) (2003), is acting as the agent of the shipper for purposes of arranging or procuring shipment of goods in a multimodal carriage contract. Such a presumption should hold unless some other feature of the transaction suggests that the freight forwarder or NVOCC is actually acting on its own account. Very few transactions (if any) in international commerce, as a matter of actual practice, feature a freight forwarder or NVOCC as a principal.

While recognizing that the principal-agent determination can vary from case to case, depending on the terms of a bill of lading and the course of performance between the parties, this Court should avoid the pronouncement of any rule that would exalt form over function. Here, the fact that in the ICC/Hamburg bill, ICC is listed as the shipper does not necessarily disparage ICC's status as Kirby's agent. And as this issue can be conclusively settled in Petitioner's favor based on this Court's precedent in *Great Northern Railway Co. v.*

O'Connor, 232 U.S. 508, 514 (1914) (ruling that when a carrier accepts goods from an intermediary, liability limitations in the bill of lading are enforceable against the cargo owner, irrespective of the intermediary's status as agent or principal), this Court should certainly avoid any sweeping rule that would have the effect of complicating what would otherwise be the expected agency relationships between all the links in the multimodal chain of carriage. The safest course would be either to apply *Great Northern Railway* and eliminate the principal-agent distinction altogether in these transactions or settle on a rule that would presume (absent clear and convincing evidence to the contrary) that the freight forwarder or NVOCC is acting as the shipper's agent.

SUMMARY OF ARGUMENT

I. This Court's previous holding in *Robert C. Herd & Co. v. Krawill Machinery Co.*, 359 U.S. 297 (1959), established the twin principles that Himalaya Clauses in bills of lading should be strictly construed as a contractual term and that their liability limits should be extended to only those beneficiaries intended by the parties. Based on the clear language of the bill of lading concluded between the shipper (Kirby) and its freight forwarder (ICC), this Court can safely conclude that the Himalaya Clause was intended to benefit carriers, such as Norfolk Southern, subsequent in the chain of transit. The language of the Kirby/ICC bill refers to "other person[s] including any independent contractor whose services have been used in order to perform the contract." Kirby/ICC bill, ¶ 10.1; J.A. 83. This expansive language is in clear contrast to the bill at issue in *Herd*.

Kirby knew it was concluding a through bill, in which

carriage of goods to an inland destination (Huntsville, Alabama) was required, and thus the shipper was on notice that a variety of multimodal carriers (including at least one inland carrier) would have to be employed in order to complete the contract. The combination of a Himalaya Clause and a Clause Paramount (at Kirby/ICC bill, ¶ 10.2; J.A. 83) is strongly indicative that the parties were intending as broad an ambit as possible for the extension of the ocean carrier's defenses and liability limits to subsequent parties in the chain of transit.

No recourse to artificial privity of contract restrictions should be had in the face of such contract language, especially where the inclusion of such a requirement (dependent, as it would have to be, on distinguishing between the use of relational and descriptive terms in bills of lading) would needlessly complicate international shipping arrangements. As has been recognized in the most recent international codification project on carriage of goods, a privity of contract requirement would impose a heavy burden on participants in multimodal transactions to renegotiate bills of lading while goods are in transit, causing needless delays and expense.

This Court's decision in *Herd* does not require that every intended beneficiary of a Himalaya Clause be identified. This Court should not impose a requirement that subsequent operators completing a multimodal contract with inland transport should be particularly enumerated in the bill of lading. So long as a land-leg is contemplated in a multimodal bill of lading, there is no point to requiring such specificity. The effect of doing so would, again, be to require a major reordering of multimodal arrangements.

II. This case can be resolved completely in Petitioner's favor based on the Himalaya Clause in the Kirby/ICC bill. In the event that the Court should consider the legal effect of the ICC/Hamburg bill, it should hold that freight forwarders or non-

vessel-operating common carriers (NVOCCs) are presumed to be acting as the agent of the cargo owner, for purposes of binding the shipper to Himalaya Clauses running to subsequent carriers, unless there are clear and convincing indications that the freight forwarder or NVOCC is acting on its own account. This rule has been consistently affirmed in this Court's jurisprudence. See *New Jersey Steam Navigation Co. v. Merchant's Bank*, 47 U.S. (6 How.) 344 (1848); *Great Northern Ry. Co. v. O'Connor*, 232 U.S. 508 (1914). Such a presumption would also recognize the unique role played by freight forwarders and NVOCCs as intermediaries between shippers and carriers.

ARGUMENT

I. The Himalaya Clause in the ICC Bill of Lading Extended COGSA's Limitation of Liability to Norfolk Southern

A. Under *Robert C. Herd & Co.*, the ICC Bill of Lading's Liability Limitations Extend to Petitioner

1. *Robert C. Herd & Co. v. Krawill Machinery Co. ("Herd")* established that parties may extend COGSA's liability limitation to third parties so long as the language of the contract, strictly construed, fairly expresses that to be the intent of the parties. 359 U.S. 297, 304 (1959). *Herd* arose when a stevedore, hired by the carrier of the goods, damaged the shipper's goods. The bill of lading between the shipper and the carrier provided only that the carrier's liability would be limited to $500 and did not mention the liability of other entities. The shipper brought suit against the stevedoring company to recover for the damages to the goods. The stevedore company argued that the bill of lading also limited its liability.

This Court held that the bill of lading did not extend the

COGSA limitation to the stevedore. See id. at 308. First, the Court noted that, by its own terms, COGSA applies only to carriers (that is, the owner or the charterer who enters into a contract of carriage with the shipper). See id. at 301-02. Second, and more importantly, the Court held that the bill of lading had not extended that limitation of liability to the stevedore because it addressed only the carrier's liability. See id. at 302. The Court noted:

> There is, thus, nothing in the provisions to indicate that the contracting parties intended to limit the liability of stevedores or other agents of the carrier for damages caused by their negligence. If such had been a purpose of the contracting parties it must be presumed that they would in some way have expressed it in the contract.

Id. The Court went on to hold:

> [C]ontracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries, for they "are not to be applied to alter such familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties."

Id. at 304 (quoting *Boston Metals Co. v. S/S Winding Gulf*, 349 U.S. 122, 123-124 (1955) (Frankfurter, J., concurring)). *Herd*, thus, requires two things for Himalaya Clauses: (1) strict construction of the contractual terms; and (2) extension of the limitation only to those intended beneficiaries of the contract as clearly expressed by the contracting parties.

2. As admonished by the Court in *Herd*, ICC and Kirby clearly expressed their intent to extend the COGSA limitation of liability in their bill of lading to third parties. The express language of that bill refutes Respondents' likely argument that

the Kirby/ICC bill does not limit Norfolk Southern's liability. Clause 10.1 states that the conditions of COGSA, including the limitation of liability, apply "whenever claims relating to the performance of the contract evidenced by this [bill of lading] are made against any servant, agent or *other person including any independent contractors whose services have been used in order to perform the contract*." Kirby/ICC bill ¶ 10.1; J.A. 82-83 (emphasis added). The Kirby/ICC bill was a through bill of lading[2] that designated Savannah, Georgia, as the receiving port and Huntsville, Alabama, as the ultimate destination of Kirby's goods. J.A. 67. It must have been notorious to the parties that carriage to Huntsville, Alabama, requires inland transportation.

The Kirby/ICC bill of lading is distinguishable from the bill in *Herd*. While the bill in *Herd* limited only the carrier's liability, 359 U.S. at 302, indicating the parties' intent to extend COGSA's limitation narrowly, the broad language in the Kirby/ICC bill indicates ICC and Kirby's intent that, at the least, persons whose services were necessary to complete the contract would benefit from the Himalaya Clause.

Moreover, the Himalaya Clause's language in the Kirby/ICC bill of lading is not ambiguous. "[I]ndependent contractor" is a common term in contract. It means, "[o]ne who is hired to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it." BLACK'S LAW DICTIONARY 774 (7th ed. 1999). "Unlike an employee, an independent contractor who commits a wrong while carrying out the work does not create liability for the one who did the hiring." Id. Particularly in light of the bill's use of

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[2] A through bill of lading is one which governs the entire course of transport and applies to the connecting carriers despite the fact that they are not parties to the contract. *Capitol Converting Equip., Inc. v. LEP Transp. Inc.*, 965 F.2d 391, 394 (7th Cir. 1992).

the phrase, "other persons," the term "independent contractor" demonstrates that the inland carrier would be covered under the contract. If the parties had wished to limit the liability to only those who performed the sea carriage or those whom ICC had directly hired, then they would not have used the terms "other person" or "independent contractor" and would merely have extended COGSA to ICC, its agents, and the carrier.

Furthermore, "other person" and "independent contractors" do not stand alone in Clause 10.1 of the Kirby/ICC bill. Rather, the phrase "whose services have been used in order to perform the contract" modifies "other persons" and "independent contractors." Kirby/ICC bill ¶ 10.1; J.A. 83. Strictly construed, that modifier includes inland carriage because Huntsville, Alabama, is not a port on or near the ocean; performing the contract necessarily required inland transportation. Since inland transportation was necessary to perform the contract, Norfolk Southern is readily characterized as an independent contractor as defined in Clause 10.1.

Three other factors strengthen the conclusion that even if Petitioner is to be characterized (as Respondents suggest, Op. Cert. 28) as a sub-sub-subcontractor, Norfolk was still an intended beneficiary of the Kirby/ICC bill of lading. First, Clause 10.1 says "other persons *including* independent contractors." ICC bill ¶ 10.1; J.A. 83 (emphasis added). The term "including," demonstrates that the intended beneficiaries of the Himalaya Clause are actually broader than just "independent contractors." By disregarding "other persons" as an ambiguous term, and only looking to "independent contractors," this Court would be giving the clause a more preclusive effect than the parties intended. There is no doubt that this would constitute a broad extension of COGSA's defenses and liability limitations. *Herd*, however, does not prohibit broad extensions of limitation of liability; it merely requires that if an extension is broad, it

must clearly identify its intended beneficiaries.

The second factor demonstrating that the Kirby/ICC bill benefits indirect subcontractors such as Norfolk Southern is that the Himalaya Clause does not require ICC to hire directly those who perform the contract. Clause 10.1 states, "other persons including independent contractors whose services *have been used in order to perform the contract*" shall be covered by the limitation of liability. ICC bill ¶ 10.1; J.A. 83 (emphasis added). Even strictly construed, this language extends to Norfolk Southern. The language "have been used" indicates an intention to encompass broadly those whose services are used to complete the transport to Huntsville, Alabama, regardless of who contracted for those services.

Furthermore, the bill of lading authorizes Kirby/ICC "to procure the performance of the entire transport." ICC Bill ¶ 2.1; J.A. 75. "Procure" means to "acquire" or "obtain." AMERICAN HERITAGE DICTIONARY 660 (3d ed. 1994). Since ICC itself does not transport goods, but only arranges for and coordinates the transportation (see Pet. Cert. 5), "procure," strictly construed, includes those situations when ICC contracts with another for the guarantee of performance of the entire contract. By contracting with Hamburg Süd to transport the cargo to Huntsville, Alabama, from Australia, ICC "procured" the services needed to perform the contract, regardless of whether Hamburg Süd completed the inland transportation or hired another party to complete the carriage.

Third, if ICC and Kirby desired to exclude sub-sub-subcontractors from Clause 10.1's coverage, they could have used language that has been commonly interpreted to accomplish that objective. See e.g., *Motel Mikinberg v. Baltic Steamship Co.*, 988 F.2d 327, 332-33 (2d Cir. 1993) (holding that where Himalaya Clause only extended benefits to independent contractors employed by the carrier, defendant was

required to show privity of contract with the carrier to benefit from the Himalaya Clause); *Toyomenka, Inc. v. S.S. Tosaharu*, 523 F.3d 518, 521 (2d Cir. 1975) (same). Since ICC and Kirby could have used language accomplishing that objective – such as "employed by the Freight Fowarder or Carrier" – their choice of "used in order to perform the contract," demonstrates their intent that sub-sub-contractors are intended beneficiaries of the Himalaya Clause.

3. The gravamen of *Herd*'s holding is that to extend COGSA's limitation of liability to third parties, the parties must clearly express that intent in their contracts. 359 U.S. at 304. In contrast to the bill at issue in *Herd*, the ICC bill of lading evidences an intent to extend the limitations of COGSA expansively. *Amici* P&I Clubs are not asking the Court to stretch the meaning of contract language by extending the Himalaya Clause's coverage to unforeseeable, incidental, or random services in connection with the transport. Instead, *Amici* P&I Clubs ask the Court to recognize that when a contract requires inland transportation and the Himalaya Clause broadly covers persons whose services are used to perform the contract, extending the limitation to cover necessary aspects of the contract does not violate *Herd*'s clarity and strict construction requirements. Indeed, such is consistent with this Court's observation that "a charter-party is an informal instrument as often as otherwise, having inaccurate clauses, and that on this account they must have a liberal construction, such as mercantile contracts usually receive, in furtherance of the real intention of the parties and usage of trade." *Raymond v. Tyson*, 58 U.S. (17 How.) 53, 59 (1854).

B. Neither *Herd* Nor Current International Practice Requires Privity of Contract to Extend Liability Limitations to Third Parties

The Court in *Herd* did not hold that, to extend the limitation

of liability to third parties, those parties must be either (1) specifically mentioned in the bill of lading, or (2) in contractual privity with the entity that issues the initial bill of lading to the shipper. Requiring privity of contract with the initial issuer of the bill of lading contradicts the reasoning of *Herd* and unnecessarily expands its holding. It, moreover, would vastly complicate the actual operations of maritime commerce today.

1. The Court in *Herd* required only that Himalaya Clauses be strictly construed and limited to intended beneficiaries, as expressed by the contract's language. See id. at 304. In determining that the Himalaya Clause did not extend to the stevedore, the Court emphasized two things. First, the Himalaya Clause only addressed the liability of the carrier. See id. at 302. Second, the Court held that the Himalaya Clause did not apply to the stevedore because it was not a party to the contract. See id. at 304.

The Court in *Herd* did not require, however, that to benefit from the Himalaya Clause the party must either be a party to the contract or specifically mentioned. Tellingly, the Court stated: "[i]f such had been a purpose of the contracting parties [to extend the limitation of liability to stevedores] it must be presumed that they would *in some way* have expressed it in the contract." Id. at 302 (emphasis added). This Court's qualifying language – "in some way" – demonstrates that the Court envisioned that broad extensions of COGSA in the Himalaya Clause would not be undermined by inflexible rules such as privity of contract that are contrary to the clause's language. Rather, the Court was only seeking to ensure that third parties benefit from the Himalaya Clause only when such intent is fairly expressed.

2. The Kirby/ICC bill of lading is distinguishable from the bill in *Herd*. Unlike in *Herd*, the Kirby/ICC bill contains a Clause Paramount immediately following the Himalaya Clause.

The Clause Paramount states that "[i]n entering into this contract[,] . . . the Freight Fowarder, to the extent of these provisions, *does not only act on his own behalf*, but also as agent or trustees for such persons [mentioned in Clause 10.1], *and such persons shall to this extent be or be deemed parties to this contract*." Kirby/ICC bill ¶ 10.2; J.A. 83 (emphasis added).

By deeming "other persons including independent contractors whose services have been used . . . to perform the contract" to be parties to the Kirby/ICC bill, ICC and Kirby clearly expressed their intent that ICC need not contract directly with such connecting parties to benefit from the Himalaya Clause. To be a party to the Himalaya Clause, a person's services only need to be used in completing the performance of the contract. Furthermore, the Kirby/ICC bill of lading is a through bill of lading. An inland carrier, such as Norfolk Southern, is, thus, readily characterized as a party to the Kirby/ICC bill because inland carriage from Savannah, Georgia, to Huntsville, Alabama, was required to complete the contract. Requiring privity of contract in the presence of such unambiguous language that such privity with ICC is not necessary would render Clause 10.2 meaningless.

Furthermore, the Kirby/ICC bill did not limit how ICC could procure the completion of the contract. Kirby/ICC Bill ¶ 2.1(a); J.A. 75. That lack of limitation demonstrates that ICC and Kirby contemplated that sub-sub-subcontractors could be used to perform some or all of the transport from Australia to Alabama. Where the unambiguous language of the Himalaya Clause includes connecting parties as beneficiaries and parties to the contract, the Court should compare the nature of the services performed by the party claiming the benefit and the freight forwarder or carrier's (that is, the initial issuer of the bill of lading) responsibility under the contract. See *Akiyama Corp. of America v. M.V. Hanjin Marseilles*, 162 F.3d 571, 573 (9th Cir. 1998). Where, as here, the freight forwarder clearly assumed responsibility for the inland transportation of the cargo under the contract, and given the broad Himalaya Clause, courts should not require privity of contract.

3. *Amici* P&I Clubs do not assert that privity of contract with the freight forwarder or the carrier is never required; rather, P&I Clubs only assert that the clear language of Himalaya Clauses should be enforced. For instance, requiring privity of contract is appropriate where the Himalaya Clause only extends benefits to those persons "used or employed" by the ocean carrier or the freight forwarder. See e.g., *Motel Mikinberg v. Baltic Steamship Co.*, 988 F.2d 327, 332-33 (2d Cir. 1993) (holding that benefits of Himalaya Clause did not extend to a sub-sub-contractor where Himalaya Clause only extended benefits to persons "employed by the Carrier"); *Taisho Marine & Fire Ins. Co. v. The Vessel "Gladiolus"*, 762 F.2d 1364, 1367-68 (9th Cir. 1985) (same). Where the contract by its own terms requires privity of contract, such an interpretation is consistent with *Herd*. The Kirby/ICC bill contains no such language. If ICC and Kirby had intended to require privity of contract to benefit from the Himalaya Clause, they could have used language such as "employed by the Freight Forwarder."

A rule distinguishing between such relational terms as "agent" or "independent contractor," and descriptive terms, with the former requiring privity of contract and the latter not, unnecessarily complicates international shipping contracts. First, such a rule would frustrate the intentions of parties not familiar with American law because it would preclude reliance on the plain language of the contract. Second, such a rule would lead to unanticipated liability on the part of someone who readily fits the description of a "relational" term in the Himalaya Clause but who is nonetheless not in privity of contract with the freight forwarder or other initial issuer of the bill. That is the

situation here: Norfolk Southern clearly fits the description of an independent contractor whose services were used to perform the contract in the Kirby/ICC bill, and, but for the arcane interpretation proposed by the Respondents and adopted by the court below, would be protected from full liability. Moreover, as has been previously noted by *Amicus* United States, under a privity of contract rule, Norfolk Southern would have been entitled to the limitation had it contracted directly with ICC. U.S. Pet. Br. at 16. The result should not be different because ICC transferred the responsibility of completing the entire contract to Hamburg Süd. Id.

4. Furthermore, the realities of international shipping counsel against imposing a privity of contract requirement (unless the bill of lading so requires) because such a rule would render international shipping unduly burdensome and liabilities unpredictable. As noted by *Amicus* United States, a single bill of lading might encompass multiple containers, the contents of which may be owned by many different parties and potentially directed to many different final destinations. U.S. Pet. Br. at 14. As noted by courts below, requiring such privity of contract would impose a heavy burden on carriers and could delay shipment as a result of the carrier's attempts to identify and notify the owners of the cargo. See e.g., *Stolt Tank Containers, Inc. v. Evergreen Marine Corp.*, 962 F.2d 276, 279 (2d Cir. 1992). Where the unambiguous language of a contract eschews privity of contract as necessary to benefit from the Himalaya Clause, a rule distinguishing between "relational" and "descriptive" terms would create uncertainty, unpredictability, and heavy burdens on connecting carriers. Indeed, that is why some courts have rejected a carriage idiom for this nexus of relationships, preferring, instead, to premise their decisions on a theory that a sub-bailee is protected by all the limitations and exclusions that a bailee possesses. See *Elder, Dempster & Co.*

Ltd. v. Patterson, Zochonis & Co., [1924] A.C. 522, 548 (H.L.) (U.K.); *Lerakoli, Inc. v. Pan Am. World Airways, Inc.*, 783 F.2d 33, 36 (2d Cir. 1986); RESTATEMENT (FIRST) OF AGENCY § 347 (1958).

This functional approach has likewise been recognized in the latest international codification efforts on this subject. Article 4bis, paragraph 2 of the Hague-Visby Rules,[3] had a somewhat ambiguous provision on this subject, allowing that in actions relating to the loss of goods that are "brought against a servant or agent of the carrier (such servant or carrier not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention." Id. art. 4bis, para. 2, reprinted in 6 BENEDICT ON ADMIRALTY, at 1-27. While it has been suggested that this provision categorically removes independent contractors of carriers from the protection of Hague-Visby's liability limits, in fact it has been construed merely (as this Court's rule in *Herd* has) as a requirement of particularity in specifying a class of beneficiaries for defenses and limitations under a bill of lading.

This course is consistent with the practice of foreign jurisdictions which have construed Himalaya Clauses to extend to all agents and parties in the course of carriage – and not just those within a privity of contract. See *The New Zealand Shipping Co. Ltd. v. A.M. Satterthwaithe & Co. Ltd., (The "Eurymedon")*, [1975] A.C. 154, [1974] 1 Lloyd's Rep. 534, 540 (P.C. 1974) (appeal taken from New Zealand) (U.K.);

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[3] Known more formally as the Brussels Protocol to Amend International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Visby Amendments), Feb. 23, 1968, 1977 Gr. Brit. T.S. No. 83 (Cmnd. 6944), reprinted in 6 BENEDICT ON ADMIRALTY Doc. 1-2 (7th rev. ed. 2001).

Salmond and Spraggon (Australia) Pty. Ltd. v. Port Jackson Stevedoring Pty, Ltd., (The "New York Star"), [1980] All E.R. 257, [1980] 2 Lloyd's Rep. 317 (P.C. 1980) (appeal taken from Australia) (U.K.); *The "K.H. Enterprise,"* [1994] 2 A.C. 324, [1994] 1 Lloyd's Rep. 593, 603 (P.C. 1993) (appeal taken from Hong Kong) (U.K.) (decision also premised on bailment theories); *Can Pac International Freight Services Ltd. v. Canadian International Paper Co.*, [1984] F.C. 1083, at ¶ 8 (Can. Fed. Ct. 1984). To the extent that Petitioner's submissions are entirely consistent with *Herd*, it is important to realize that foreign courts have followed the same doctrine, without regard to artificial principles of privity of contract.

Moreover, this approach has been confirmed in the most recent set of negotiations conducted by the U.N. Commission on International Trade Law for a Draft Instrument on the Carriage of Goods. See U.N. Commission on International Trade Law [UNCITRAL], *Draft instrument on the carriage of goods [by sea]*, U.N. Doc. A/CN.9/WG.III/WP.32 (4 September 2003) (available at http://www.uncitral.org/en-index.htm. (visited March 16, 2004)). Article 15 of the draft covers liability of performing parties to ocean bills of lading, which includes a carrier and any person that "acts, either directly or indirectly, at the carrier's request . . . regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage." Id. art. 1(e), reprinted at U.N. Doc. A/CN.9/WG.III/WP.32, at 9. The Draft Convention goes further to extend a bill of lading's defenses and liability limits to performing parties as well as the "performing party's sub-contractors and agents, who performs or undertakes to perform any of the carrier's responsibilities under the contract of carriage," id. art. 15, para. 3(b), reprinted at 28, as well as those who have been "delegated the performance of any of the carrier's responsibilities under the contract of carriage, including

its sub-contractors, employees and agents. . . ." Id. art. 15, para. 3(c). In such situations, any of these enumerated parties – whether or not "performing parties" under a bill of lading – are "entitled to the benefit of the defences and limitations of liability available to the carrier under this instrument if it proves that it acted within the scope of its contract, employment or agency." Id. art. 15, para. 5, reprinted at 29.

In short, the most current enunciation of international norms for the carriage of goods by sea eschews the formalistic privity of contract approach advanced by the Respondents here. Instead, the international community has preferred to employ a more supple analysis in which the actual relationship of parties in the chain of services for multimodal transport are assessed, irrespective of "whether that person is a party to, identified in, or has legal responsibility under the contract of carriage." Id. art. 1(e), reprinted at 9. Under this standard, Norfolk Southern should clearly benefit from the liability limitation provisions of the Kirby/ICC bill of lading.

C. *Herd* Does Not Require that the Himalaya Clause Specifically Mention Inland Carriers When Completion of the Contract Requires Inland Transportation

Herd's clarity and strict construction standards do not require that a Himalaya Clause specifically mention "inland carriers" for them to benefit from a Himalaya Clause. A distinction between maritime and non-maritime services, which would create a rule of requiring the specific mention of inland carriers, would render the plain language of Himalaya Clauses unreliable and would undermine the *Herd* standard by creating exceptions to the contract that contradict its plain language.

1. As many courts have recognized, *Herd* does not require that a Himalaya Clause mention every intended beneficiary. See

e.g., *Certain Underwriters at Lloyds' v. Barber Blue Sea Line*, 675 F.2d 266, 270 (11th Cir. 1982). Creating a distinction between maritime and non-maritime services, and thus requiring inland carriers to be specifically mentioned, undermines the *Herd* standard where, as here, inland carriage is an obvious and necessary part of completing the contract. The driving principle in *Herd* is that contracts in derogation of the common law must be clear so as not to upset the well settled expectations of the parties. See 359 U.S. at 304-05 (stating that extending the Himalaya Clause to stevedores where the contract did not mention them would upset the long line of case law that agents are responsible for their own acts). Applying that same principle here counsels against creating a distinction that is contrary to the plain language of clause 10.1 of the Kirby/ICC bill. The Himalaya Clause applies to persons whose services are used to perform the contract. Kirby/ICC Bill ¶ 10.1; J.A. 82-83. Performance of the contract, and not the maritime character of the services, is thus the relevant distinction that the Court should consider.

2. The circumstances surrounding the Kirby/ICC bill also evidence the parties' intent that inland carriers would benefit from Clause 10.1. With little effort, Respondents could have excluded inland carriers from the Himalaya Clause's protection. In the face of Clause 10.1's unambiguous and broad application, Kirby's failure to exclude inland carriers from the Kirby/ICC bill when Kirby knew that ICC's completion of the contract required ICC to procure inland transportation evidences an intent that inland carriers not be excluded. Finally, had it been ICC's intention that the COGSA limitation not apply to inland carriers, it is curious that ICC agreed to the same limitation of liability in the Hamburg Süd bill of lading, which specifically mentioned inland carriers. ICC/Hamburg Bill ¶ 5(b); J.A. 52-53. ICC and Kirby did not intend to exclude necessary inland carrier's from

Clause 10.1's coverage.

3. The Eleventh Circuit's emphasis on the intent of the drafters of the FBL standard form is misplaced. *Kirby v. Norfolk Southern Railway Co.*, 300 F.3d 1300, 1310-11 (11th Cir. 2002). The principle established by *Herd* sought to render certainty in contract language and predictability in liability. 359 U.S. at 302 (noting that nothing in the bill purported to limit the liability of stevedores); id. at 305 (refusing to alter familiar rules of negligence in the absence of contrary contractual language). Like the situation in *Herd*, no evidence from the contract language exists that ICC and Kirby intended to distinguish between maritime and nonmaritime services necessary to perform the contract. Reliance on the intentions of those who drafted the FBL would undermine effectuating the intent of the actual parties to the bill as evidenced by both the Himalaya Clauses language and the circumstances surrounding the ICC bill of lading.

Moreover, *Amici* P&I Clubs would submit that a fair reading of the FBL form would permit the extension of liability limits to inland carriers, without a requirement that such carriers be specifically listed. The concept of "network" liability for carriers – a recognition of the multimodal revolution in the transport of goods across the globe – need not necessarily preclude the extension of ocean carrier liability limits (as under COGSA) to inland carriers, where such carriage was directly contemplated under the bill of lading (as here). The court of appeals' attempt, see 300 F.3d at 1311, to demarcate various liability limitation regimes to certain spatial zones (ocean liability limits for ocean carriage; rail and trucking liability limits for inland carriage) will unquestionably cause massive disruptions in what should be a seamless web of multimodal connections. As the court below seemed to admit, see id., there is always the problem of "parties who are, so to speak, between

liability regimes, at the fringes of the sea regime – stevedores, terminal operators, and the like." Id. Although not apparent on the facts of the current case, it is entirely possible that a short haul rail or truck connection may be required in some maritime carriage contexts – as with transits of the Panama and Suez canals and the Bosporus and Dardanelles straits.

Furthermore, a sharp distinction in the liability context between maritime and non-maritime services would produce arbitrary and capricious results in determining whether an inland carrier is an intended beneficiary of the Himalaya Clause. Instead, in cases where performance of the contract determines the beneficiaries of the clause, the Court should "compare the nature of the services provided by the party with [the initial issuer of the bill of lading's] responsibility under the bill of lading or contract of carriage." See *Akiyama Corp. of America v. M.V. Hanjin Marseilles*, 162 F.3d 571, 573 (9th Cir. 1998). Focusing on the nature of the services performed in relation to ICC's responsibility gives Clause 10.1 its intended effect without rendering it or other similar contracts subject to an uncertain and unapparent distinction between maritime and non-maritime services. Under this test, Norfolk Southern, by performing a necessary, albeit non-maritime, part of the contract would be covered since securing transportation from Savannah, Georgia, to Huntsville, Alabama, was ICC's responsibility under the bill of lading.

4. *Amici* P&I Clubs are not asserting that any time someone's services are employed to complete an ocean carriage contract that they should be or would be covered by a clause with the same language as Clause 10.1 of the Kirby/ICC bill. Rather, P&I Clubs assert that where inland transport services are a *necessary* and foreseeable responsibility of the freight forwarder or other initial issuer of a bill of lading, and no language in the contract evidences an intent to exclude those

services from the Himalaya Clause, those services should benefit from the extension of the COGSA liability limitation.

And, as regards the Himalaya Clause at issue here, *Amici* P&I Clubs are not advocating an overruling of *Herd*. Given the lack of ambiguity in the Kirby/ICC bill, several other reasons exist for not imposing either a privity of contract or a requirement that the Himalaya Clause specifically mention "inland carriers." First, if shippers are unsatisfied with the broad terms of the Himalaya Clause and Clause Paramount, they are in the best position to change that language. For instance, here, Kirby knew that an inland carrier would be necessary to perform the contract because the ICC bill specifically designates Savannah, Georgia, as the intended port and Huntsville, Alabama, as the cargo's final destination. J.A. 67. Having such knowledge and given the broad language of the Himalaya Clause, Kirby could have easily contracted to exempt entities that otherwise are parties to and beneficiaries of the contract.

Furthermore, should a shipper in Kirby's position choose not to adjust the language of the contract, a shipper may protect itself by either rejecting the $500 limitation in COGSA and designating a higher amount, 46 U.S.C. § 1304(5) (2003), or, having chosen to pay the lower freight rate accompanied by the COGSA limitation, by insuring the cargo, as Kirby did here, see Pet. Cert. at 7. Given that a single container may hold multiple goods owned by multiple parties and that a single bill of lading often covers multiple containers, see U.S. Pet. Br. at 14, shippers are in the best position to insure against negligence. COGSA protects carriers who are often unaware of the value of the goods that they ship and, thus, requires the shippers to contract for greater protection. Where a bill of lading unambiguously extends that protection to well-identified third parties, those protections should be enforced.

Respondents' suggestion, Op. Cert. at 21, that if the ruling

of the court below is widely followed that internal carriers such as Norfolk Southern will cheerfully abstain from multimodal transactions is fanciful at best. More likely, it will inalterably rent the seamless web of multimodal shipments that has become a hallmark of fast, efficient, and (relatively) cheap global transportation. Under Respondents' view, see id., any inland carrier (or, indeed – as discussed above – any contractor not within direct privity with the bill issuer) will be obliged to open negotiations with the shipper, in mid-transport, to secure favorable liability limit terms. This will result in untold delays in shipments or vast freight or insurance premium increases as the transaction costs of multimodal transport skyrocket.

Lastly, Respondents' assertion that this problem can be cured by indemnification side-agreements between vessel carriers and inland carriers (or those not in direct privity), see id., ignores the fact that the current structure of the marine insurance industry – of which *Amici* P&I Clubs play an important role – precludes the use of such side-deals. Insurance industry practice for the past decades has demonstrated that such side insurance arrangements are counterproductive to the efficient control of risk, see U.S. Pet. Br. at 15 n.5, particularly as between parties from different sectors in the marine transport world.[4] In short, the "modest solutions" propounded by

[4] The Rules of the International Group of P&I Clubs provide that they will not cover members' risks should the carrier contract for sea carriage on terms less favorable than the Hague/Visby Rules. The Clubs will provide cover in respect to liabilities incurred under a multimodal (or door-to-door) contract involving a sea-leg, under which the shipowner assumes responsibility for the whole of the carriage, including that performed by some mode of transportation other than sea-going vessel, such as road or rail. Before member Clubs will cover such multimodal risks, however, it must be shown

Respondent as justifications for the legal rule they would advance here are neither modest nor efficacious in the management of the marine transport industry.

II. A Freight Forwarder or NVOCC Should be Presumed to be Acting as an Agent of the Shipper

Amici P&I Clubs would concur with the views of the United States that this case can certainly be resolved completely in Petitioner's favor based on the Himalaya Clause in the Kirby/ICC bill. See U.S. Pet. Br. at 18. Should the Court also decide on the effect of the bill of lading concluded between ICC and Hamburg Süd, it is common ground between the parties that the ICC/Hamburg bill contains a Himalaya Clause that would extend all of ICC's defenses and liability limitations to Norfolk Southern. The only question would be, then, whether Kirby was bound by the bill concluded between its freight forwarder (ICC) and the first ocean carrier in the chain of transport (Hamburg). In short, was ICC acting as Kirby's agent in concluding the bill (thus binding Kirby), or was it acting as a principal on its own account (and so precluding Kirby's responsibility)?

Amici P&I Clubs submit that the proper rule, as reflected in

that (1) contracts for the non-sea-legs are on terms no less favorable than any legislation compulsorily applicable to such mode (including liability limits); and (2) shipowners preserved their right of recourse against other parties involved in performance of the other non-sea-legs. See U.N. Commission on International Trade Law [UNCITRAL], *Preparation of a draft instrument on the carriage of goods [by sea], Compilation of replies to a questionnaire*, U.N. Doc. A/CN.9/WG.III/WP.28, at 37 (31 January 2003) (submission by International Group of P&I Clubs) (available at http://www.uncitral.org/en-index.htm. (visited March 16, 2004)).

this Court's precedents, in acts of Congress, and the operating practices of participants in maritime commerce, is that a freight forwarder or non-vessel-operating common carrier (NVOCC) is presumed to be an agent of the shipper unless there are clear and convincing indications to the contrary (such as in the course of dealing between the parties) that the freight forwarder or NVOCC is actually acting on its own account. Indeed, *Amici* P&I Clubs would submit that it is hard to imagine a set of practical circumstances, in actual international commerce, where a freight forwarder or NVOCC would be regarded as a principal in a transaction, and not as an agent of a shipper.

At the same time, it must be acknowledged that any ascertainment of an agency-principal relationship between two or more commercial entities – particularly in a context as complex as present-day multimodal carriage of goods – is necessarily a fact-intensive inquiry. It may well be that on the facts of this case that ICC was acting as Kirby's agent. It certainly is *not* dispositive that in the ICC/Hamburg bill, ICC was listed as the shipper. Form follows function in maritime transactions such as these; whatever ICC's formal role, it was serving as Kirby's facilitator in moving the shipment from Sydney, Australia, to Huntsville, Alabama.

1. The Court may simply wish to apply the sensible rule reached in its earlier decision in *Great Northern Railway Co. v. O'Connor*, 232 U.S. 508 (1914), that when a carrier accepts goods for transport from an intermediary, the liability limitations in the carrier's terms of carriage are enforceable against the cargo owner regardless of whether the intermediary contracted with the carrier "as agent [of the cargo owner] or Forwarder." Id. at 514. Indeed, this rule can be traced back in U.S. jurisprudence to *New Jersey Steam Navigation Co. v. Merchant's Bank*, 47 U.S. (6 How.) 344, 379-80 (1848), where this Court noted "the carrier . . . is considered in law the agent or

servant of the owner. . . .," id., and thus held that a contractual limitation of liability was binding on the cargo owners. See id. at 382-84. This rule has been reaffirmed in *Chicago, Milwaukee, St. Paul & Pacific Railroad v. Acme Fast Freight, Inc.*, 336 U.S. 465 (1949), where it was observed that "the shipper is the undisclosed principal of its agent, the forwarder, in the latter's contract with the carrier." Id. at 488 n.27.

Amici P&I Clubs believe the generic rule of agency developed in these cases is certainly applicable in the context raised here. Freight forwarders and NVOCC's have been presumed by lower courts to be acting as the agent of the shipper for purposes of contracting for through carriage, absent some clear indication that the freight forwarder or NVOCC is actually acting on its own account. See *Kukje Hwajae Ins. Co. v. The M/V Hyundai Liberty*, 294 F.3d 1171, 1175-77 (9th Cir. 2002), petition for cert. pending *sub nom. Green Fire & Marine Ins. Co. v. M/V Hyundai Liberty*, No. 02-813 (filed Nov. 22, 2002); *SPM Corp. v. M/V Ming Moon*, 22 F.3d 523, 526-27 (3d Cir. 1994); *Insurance Co. of N. Am. v. S/S American Argosy*, 732 F.2d 299, 300-01 (2d Cir. 1984).[5] In short, there is no reason for the Court to deviate from its well-established precedents that a freight forwarder or expediter is presumed to be the agent of the

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[5] This is consistent with the special agency role that has been acknowledged for NVOCCs. See *Ins. Co. of N. Am. v. M/V Ocean Lynx*, 901 F.2d 934, 937 n. 2 (11th Cir.1990) ("[The cargo owner] may treat [the NVOCC] as a common carrier for purposes of COGSA, but underlying carriers ... treat [the NVOCC] as [the cargo owner's] agent."); *S/S Am. Argosy*, 732 F.2d at 301 ("With respect to the vessel and her owner, however, the NVOCC is an agent of the shipper. . . ."); *Orion Ins. Co. v. M/V "Humacao"*, 851 F. Supp. 575, 577-78 & 577 n. 4 (S.D.N.Y.1994) (concluding that an NVOCC acts as the agent of the cargo owner when it agrees to the terms of the bill of lading issued by the vessel's owner).

shipper in all carriage contexts.

2. *Amici* P&I Clubs believe that ICC's role as Kirby's agent can be properly determined without recourse to further analysis of ICC's status as an "ocean transportation intermediary" (either an "ocean freight forwarder" or NVOCC) under applicable federal statutes. See 46 U.S.C. App. § 1702(17). Nonetheless, this Court could well accept that ICC has satisfied the statutory requisites of NVOCC status. See 46 U.S.C. App. § 1702(17)(B) ("'non-vessel-operating common carrier' means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier."). See J.A. 37 (ICC listed as "shipper/exporter" on ICC/Hamburg bill); Pet. App. 55a-56a (referencing FBL's ¶¶ 2.1(a) & 6.1 role for ICC). Indeed, it appears that in legislating this provision of the Shipping Act, Congress was expressly recognizing the unique agency role of NVOCCs and freight forwarders.

That said, *Amici* P&I Clubs acknowledge that the record before the Court may not be clear enough conclusively to establish ICC's status as an NVOCC. If such is the Court's belief, it would be exceedingly ill-advised for the Court to make a ruling that would have the effect of precluding from an agency role those entities that do not qualify for NVOCC status under U.S. law. In short, satisfaction of NVOCC status would be just one way for a foreign freight forwarder or expediter to show that it was serving as an agent of a shipper in multimodal contracts such as the one at issue here. The nature of maritime commerce is such that particular U.S. statutory definitions of NVOCC status, while significant for the ascertainment of public law benefits under U.S. shipping statutes, should not be determinative of the private law agency relationships between foreign parties, even if their disputes find their way to U.S. courts.

3. *Amici* P&I Clubs would submit that the same grounds that counsel a natural reading of Himalaya Clauses to extend carrier defenses and liability limits to all subsequent links in the multimodal chain of commerce would also strongly militate in favor of a presumption that ocean freight forwarders and NVOCCs are acting as the shipper's agent unless clear and convincing evidence exists that they are actually acting as a principal on their own account. When a cargo owner places items in the stream of multimodal commerce, sure in the knowledge that a variety of carriers and operators will be contracted with to deliver the items to their ultimate destination, the shipper should be deemed to have created an agency relationship with, at a minimum, the first link in the chain (the freight forwarder or NVOCC), and to have extended all defenses and limitations to all subsequent carriers in the chain of shipment.

It is incumbent on the cargo owner in these situations to contract around the natural default rules of agency relationships and extended Himalaya Clauses. After all, both of these "off-the-rack" rules are intended to promote the expeditious transport of goods. Just as a cargo owner under COGSA may opt-out of the default liability limits and declare a higher value of goods, and thus initiate a round of negotiations for an increased standard of care by the vessel owner – and also (presumably) a higher freight quote – the cargo owner may seek to limit the normal agency powers devolved on a freight forwarder and to limit the down-stream effects of Himalaya Clauses. While the ocean carriage industry (and its marine insurers) can accommodate the occasional eccentric shipper that wishes to deviate from these default agency and Himalaya Clause rules, the nature of multimodal transport renders it infeasible to presume that *all* cargo owners would wish to diverge from standard commercial norms. This Court should decline

Respondents' invitation gratuitously to unsettle and complicate the network of relationships and contractual assumptions that have undergirded an essential feature of the most beneficial aspect of globalization: the fast, efficient, and cheap movement of goods around the world.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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March 19, 2004

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[6] Counsel acknowledges the assistance of Helen D. Silver in the preparation of this Brief.

(17)

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IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY PTY LTD D/B/A KIRBY ENGINEERING AND MMI GENERAL INSURANCE, LTD.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. In matters of significant interest to its members, AAR frequently

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[1] The parties have filed with the Court letters consenting to the filing of *amicus* briefs. No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

appears before Congress, administrative agencies and the courts on behalf of the railroad industry. Because of the railroad industry's significant participation in international commerce, this case, arising out of a shipment of cargo from Australia to Alabama, takes on relevance, and great interest, for AAR's member railroads.

The decision below has serious implications for the established commercial practices of not just petitioner, but for all large freight railroads, in an area that constitutes a significant and highly competitive sector of the railroads' business. This Court's disposition of the issues presented by petitioner will greatly influence railroads' ability to continue to conduct business in accordance with those practices, which are designed to facilitate fast, reliable movement of goods in international trade, and to assure that the terms of the carriage are well understood.

Should the Eleventh Circuit's decision be affirmed, a deeply troubling element of uncertainty and unpredictability will be injected into the efforts of railroads to manage risk and liability when participating in international commerce. Railroads would have no means of knowing what degree of liability they face when accepting goods in international commerce, and thus will be forced to react to such an outcome by seeking out alternative methods of arranging for their role in international transportation. This will lead to cumbersome, less efficient means of doing business, with the most likely recourse for railroads being to require indemnities from the parties from whom they accept freight. As such a result—including potential litigation over indenmity obligations—will be detrimental to both railroads and the international commerce in which they participate, AAR has a strong interest in amplifying the rail industry's perspective on this case in an *amicus* brief to this Court.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case of petitioner.

SUMMARY OF THE ARGUMENT

The erroneous decision below, which fails to hold a cargo owner to the contract entered into by the freight forwarder with whom the cargo owner entrusted its goods, will have a significant impact on railroads. Railroads actively participate in international commerce, moving cargo arriving from overseas by ocean carrier, primarily in containers, to final destination points in the United States. As a practical matter, railroads rarely do business directly with the overseas shippers of the cargo. Rather, they enter into arrangements with ocean carriers, often agreeing to ship large volumes of freight delivered by these parties. Well-established, economically efficient commercial practices characterize the through international transportation in which railroads participate.

The liability provisions of the Carriage of Goods by Sea Act, which were set forth in two bills of lading interpreted by the court below, establish a regime by which an ocean carrier's liability for damage to the lading is limited. These limits, which may be, and in this case, were, contractually extended to other carriers, allow carriers to offer low rates to shippers, who in turn obtain insurance to cover any excess risk. The court below interpreted the bills of lading, which clearly were meant to extend liability limitations, as not benefitting petitioner railroad, even though petitioner was an anticipated and indispensable party to the transportation required by the shipper. This ruling, which creates a windfall for the shipper's insurer, is based on notions of agency and privity which do not comport with commercial realities and sharply conflict with decisions of this Court. If the Eleventh Circuit's decision is affirmed, railroads will need to alter their practices in ways that are neither efficient nor practical, with

the consequence of upsetting established commercial norms in international shipping.

ARGUMENT

I. INTERMODAL TRANSPORTATION HAS FACILITATED EFFICIENT MEANS OF CONDUCTING INTERNATIONAL COMMERCE

Though characterized prosaically by the court below as a "bill of lading case", this case has significant ramifications for international commerce.[2] The decision of the Eleventh Circuit is grounded in technical rules that are not only contrary to established law, but also are unhinged from any consideration of policy or established commercial practices. Elevating such misplaced technicalities over the realities of international commerce, the Eleventh Circuit has called into question the logic behind the established methods of doing business that have developed over the years and have well-served participants in international commerce.

A. Intermodal Transportation is a Burgeoning Area of International Commerce in Which Railroads Play a Key Role

The circumstances out of which this case arose—the shipment of freight between continents by means of more than one mode of transportation—are ubiquitous. "Intermodal" transportation, typically involving the shipment of freight in containers or trailers, has experienced explosive growth since the 1950s, and today plays a vital role in the global economy. *See generally,* GERHARDT MULLER, *Intermodal Freight Transportation* (3d ed. 1995); DAVID J. DEBOER, *Piggyback and Containers* 159 (1992); DAVID R.

[2] A bill of lading is a document evidencing receipt of goods for shipment issued by persons engaged in the business of transporting or forwarding goods, which contains, among other things, the contract for carriage of the goods. BLACK'S LAW DICTIONARY 168 (6th ed. 1990).

MCKENZIE ET AL., *Intermodal Transportation—The Whole Story* 55-57 (1989). Containers predominate in international moves, and each year millions of containers, accounting for billions of dollars in transportation revenue, are transported from overseas to points in the United States.

The advent of containers has transformed international transportation into an integrated service, in which railroads play a prominent role. Significant use of containers by railroads began in the 1920s, while containerization of ocean cargo became widespread in the late 1950s. MCKENZIE at 32; MULLER at 12-13. During the 1960's, land and sea container transportation evolved from separate services to a combined, integrated service. MULLER at 17.[3] Shipping goods in standard-sized containers speeds the loading and unloading process and facilitates interchange between modes, with containers often unloaded off of ships at port directly onto flatcars designed for container transport. Import shipments, which typically consist of high-value items such as consumer goods, electronics, household products and clothes, are particularly suited for transportation in containers.

Intermodal transportation has given rise to numerous service providers devoted not actually to moving cargo, but to the support and facilitation of transportation in a variety of ways. MULLER at 129-40. Among other services these companies provide is the consolidation of many small shipments into large consignments for more economical shipping. JOHN J. COYLE ET AL., *Transportation* 244 (2000). International Cargo Control Pty Ltd., (ICC), the company engaged by respondent to ship its goods, is one such service provider.

Marrying up of sea and land transport has proved to be an effective means of greatly enhancing transportation effic-

[3] In the 1970s and 1980s, a number of corporate acquisitions were undertaken with the aim of creating companies with multi-modal capabilities. MCKENZIE at 47-54.

iency, largely because it permits avoidance of circuitous and lengthy ocean routes. Rather than having to route an ocean carrier to the port nearest the final destination, a container ship may head for a more convenient port of call where cargo can be loaded onto fast, dedicated trains bound for an inland destination, thereby shortening overall delivery time of international freight movements. Even where the final destination is a U.S. port and an all-water route is feasible, efficiency may call for the final leg of the move by land. MULLER at 106-107. North American railroads also play an important role in shipments that do not originate or terminate in North America. So-called "bridge" service may involve ocean carriage from Asia to a west coast port, and from the east coast to Europe, linked by transcontinental land-based transportation. MULLER at 104-105; COYLE at 245-46.

Railroads serve all the major ports ringing the U.S. coast line from Boston to Seattle-Tacoma, connecting these ports to numerous inland locations. As a result, railroads play a key role in the movement of international freight, originating much export traffic, and serving as intermediary or destination carriers for large volumes of import traffic. Railroads derive approximately $3 billion in annual revenue moving import traffic in several million containers.

B. Highly Efficient Means of Conducting "Through" Transportation Have Developed to the Benefit of International Shippers

International cargo shipments usually involve multiple modes of transportation, as well as providers of associated services, who perform different roles, often spanning thousands of miles. See *Carman Tool & Abrasives, Inc. v. Evergreen Lines*, 871 F.2d 897, 900 (9th Cir. 1989) ("Intermodal shipping transactions are relatively complex. The parties usually include the seller, one or more freight forwarders, a carrier, a consignee, as well as several banks

and insurers."); *See also* Stephen G. Wood, *Multimodal Transportation: An American Perspective on Carrier Liability and Bill of Lading Issues*, 46 Am. J. Comp. L. 403, 404 (1998). However, despite their inherent complexities, these transactions all have the straightforward goal of moving freight between two points. Shippers of cargo have an interest in making arrangements for a complete transaction, *i.e.*, shipment from origin to final destination, with all necessary transportation and associated services provided. With this aim in mind, the details of who is performing each aspect of the service is of lesser importance.

Given the various components that make up a "through" international move, arranging for the transportation typically involves a series of commercial transactions in which each party is not directly involved in the arrangement of each transaction. This case was typical in that respect: respondent Kirby, the Australian cargo owner who shipped goods from Sydney, never negotiated a contract with petitioner, the U.S. railroad that undertook to ship the goods during the inland portion of the move to its final destination, Huntsville, Alabama. Nor would doing so have been even remotely feasible. Ultimately, however, respondent sued petitioner for damage to the cargo occurring during the inland move.

The series of transactions entered into in this case were unremarkable, indeed, were typical, of international commerce. Cargo owners do not enter into individual relationships with numerous parties providing various aspects of the service, some of whom may be located on different continents. Instead, they usually will entrust their goods directly to a vessel carrier who is responsible for providing or arranging for the transportation and other services needed to move the goods to their final destination, or to a freight forwarder that will contract in its own name with a vessel carrier to provide transportation. At the other end, railroads enter into arrangements with ocean carriers calling on U.S.

ports, agreeing to transport cargo that is off-loaded from the carriers' ships, under the ocean carriers' through bill of lading, without regard to the identity of the individual shipper or the contents of individual containers.

These types of arrangements allow business to be conducted efficiently, obviating the need for foreign shippers to locate and contract with a land-based U.S. carrier for each shipment it wishes to move. The ability to consolidate freight of numerous cargo owners and arrange for through transportation to destination, utilizing multiple carriers, some of whom the foreign freight forwarder need not directly contact, is tremendously beneficial to shippers worldwide. In addition to relieving the shipper of the need to enter into numerous discrete arrangements, the ability to tender large volumes of freight enables the freight forwarder to obtain better rates than could individual shippers who often may be attempting to ship small volumes of cargo. "The services provided by third parties allow shippers to enjoy lower intermodal rates, while at the same time relieving carriers of the burden of freight consolidation and providing sufficient volumes to make intermodal shipments worthwhile." McKENZIE at 209.

Regardless of the details of a particular transaction, it is the general practice that a party other than the foreign shipper will make the arrangement that will result in the shipper's goods being placed on a train for inland transport in the United States. It goes without saying that a single entity does not (and cannot) transport goods both by sea and land, and also provide all the loading and unloading services as needed. But the fact remains that these are all pieces of the unitary service sought by the shippers wishing to move cargo from a specific origin point to a specific destination point. International shippers certainly contemplate that when they enter into a contract to move their goods, they are contracting for

services which inevitably will be performed by several parties, some located in different countries and continents.

C. Contractual Limits on Liability Supplemented By Insurance is the Most Economically Rational Way of Conducting Business and Typical of International Transportation Transactions

Liability for damage to or loss of the cargo is an area that is addressed by transportation contracts. In this case, liability limitations for loss of the goods established by the Carriage of Goods by Sea Act (COGSA),[4] and the scope of their applicability, were set forth in the bill of lading issued by the ocean carrier in the course of the underlying transaction. COGSA presents a choice of accepting statutory liability limits or declaring a higher value, a choice that is fully appreciated by "[m]ost shippers (who are sophisticated commercial parties, working with experienced freight forwarders)." Michael F. Sturley, *Carriage of Goods by Sea*, 31 J. Mar. L. & Com. 241, 244 (2000). The option of declaring full value is almost never exercised because of the higher freight rates that would accompany such a declaration. Instead, the shipper, accepting the carrier's limited liability, will choose to insure the cargo for its full value, almost invariably a less costly option.

Kirby likewise declined to declare a higher value, exercising the choice to accept the lower freight rate, and therefore accepting as well the limitation on liability, relying

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[4] Ch. 229, 49 Stat. 1207 (1936), codified at 46 U.S.C. app. §§1300-1315. Among other things, COGSA establishes limits on liability when a lading is damaged during transportation by ocean carrier. Absent declaration of a higher value for the cargo, liability is limited to $500 per package, 46 U.S.C. app. §1304(5), a limitation which, by contractual provisions known as Himalaya clauses, may be extended to other parties participating in the transportation. *Id.* at §1307. *Generali v. D'Amico*, 766 F.2d 485, 487-88 (11th Cir. 1985).

on insurance for protection against any outstanding risk. "In contracting, Kirby was given the opportunity to declare a value in excess of $500.00 and to obtain higher coverage for its cargo, paying an additional ad valorem rate charge for the shipment. Instead, Kirby separately insured its cargo with its co-plaintiff, MMI General Insurance, Ltd." *Kirby v. Norfolk Southern Ry. Co.*, No. 1:98RCV-2939-CAP (N.D. Ga., order of Oct. 11, 2000).

Not only did Kirby's choice make commercial sense,[5] it constituted what is seen as the most rationale and efficient means of doing business. The shipper, with whom the traffic originates, knows exactly what is being shipped and the shipment's value. The carriers, particularly a railroad situated a continent away that has arranged to accept numerous containers without individualized inquiry as to the specific nature of the goods contained therein or the identity of the particular shipper of the goods, generally are not in a position to ascertain the goods' value. Shipments remain in their containers, unopened until the final destination is reached. Thus, the shipper is in the best position to determine whether to declare a high value or to insure, and at what level. Similarly, insurers who underwrite this insurance know they are insuring a risk for which other parties' liability is limited.

As is common, the Himalaya clause in the bill of lading expressed an intent to extend COGSA's limitations on liability to all parties performing services under the transportation contract. Enforcing the terms of the transportation contract, the district court granted partial summary judgment to petitioner, holding that the liability limitations contained in the bill of lading issued by Hamburg Sud, the ocean carrier,

[5] "[V]irtually no sensible shipper would declare a higher value—no matter how clearly the opportunity to do so is presented–because the ad valorem freight charge that would be triggered by a declaration is almost invariably higher than the premium that a cargo underwriter would charge for insuring the same shipment." Sturley at 244.

to ICC, Kirby's freight forwarder, limited petitioner's liability to Kirby.[6] The district court did not address whether the bill of lading issued by ICC to Kirby benefitted petitioner, as it ruled that the Hamburg Sud/ICC bill of lading was "the applicable bill to the instant dispute."

Viewing the case as involving a series of atomized transactions, the Court of Appeals reversed, ruling that petitioner could not avail itself of the benefits of either bill of lading: according to the court, the Hamburg Sud/ICC bill which, the court acknowledged, protected petitioner, did not bind Kirby, and the ICC/Kirby bill that bound Kirby did not protect petitioner. *Kirby v. Norfolk Southern Ry. Co.*, 300 F.3d 1300 (11th Cir. 2002). The court held that the Hamburg Sud bill of lading did not bind Kirby because ICC, the intermediary who contracted to ship Kirby's freight, did not act as an agent. *Id.* at 1305-07. At the same time, all but ignoring the words used by the parties, the court held that while the Himalaya clause in the bill of lading issued by ICC to Kirby did bind Kirby, its extension to "any independent contractors whose services have been used in order to perform the contract" was not sufficiently specific to benefit petitioner.

[6] The Himalaya clause in the Hamburg Sud/ICC bill of lading extended the COGSA limits to, among others, "inland carriers."

II. THE ELEVENTH CIRCUIT'S DECISION MISAPPLIES THE LAW AND COMPLETELY IGNORES WELL-ESTABLISHED AND ECONOMICALLY EFFICIENT COMMERCIAL PRACTICES

A. Economically Inefficient Alternative Ways of Conducting International Commerce Will Be the Invariable Outcome of Affirming the Eleventh Circuit's Decision

The Eleventh Circuit's holding, utilizing an agent/principle analysis divorced from over a century of common carrier law, departs from the principles that this Court has applied where the owner of goods authorizes another party to ship the goods. In fact, the agency analysis the court deemed pivotal is irrelevant. Just as the "transfer company" in *Great Northern Ry. Co. v. O'Connor*, 232 U.S. 508 (1914), ICC "had been intrusted [by Kirby] with goods to be shipped." *Id.* at 514. Therefore, contrary to the Eleventh Circuit's reasoning, the carrier receiving the goods from ICC had "the right to assume that the transfer company could agree upon the terms of the shipment" regardless of whether the transfer company "be treated as agent or forwarder." *Id.* If permitted to stand, the Eleventh Circuit's ruling will empower shippers to disavow any contractual obligations that, as a commercial practice built on the foundation of this Court's unbroken precedent,[7] are entered into on their behalf by a freight forwarder whom the shipper authorizes to arrange transportation, to the detriment of downstream parties who are intended beneficiaries of the contract terms.

[7] *See New Jersey Steamship Navigation Co. v. Merchant's Bank*, 47 U.S. (6 How.) 344 (1848); *York Co. v. Cent. R.R.*, 70 U.S. (3 Wall..) 107 (1865); *Michigan Cent. R.R. v. Mark Owen & Co.*, 256 U.S. 427 (1921); *Chicago, Milwaukee, St. Paul & Pac. R.R. v. Acme Fast Freight, Inc.*, 336 U.S. 465 (1949). Petitioner's brief fully sets forth how this Court has viewed the contractual obligations that arise when a party entrusts its goods to another party. AAR will not repeat those arguments here.

Other courts of appeals have recognized that such a result ill serves the needs of international commerce and flies in the face of expectations generated by commercial norms. *E.g., Kukje Hwajae Ins. Co. v. M/V Hyundai Liberty*, 294 F.3d 1171, 1176-77 (9th Cir. 2002)(In accordance with "comm.-ercial norms" a shipper was bound by the terms of a bill of lading issued by an ocean carrier to the shipper's intermediary who, like ICC, had the duty and authority to provide carriage for the shipper's goods, and to do "whatever it needed to do in order to fulfill that obligation.") ; *Stolt Tank Containers, Inc. v. Evergreen Marine Corp.*, 962 F.2d 276, 279 (2nd Cir. 1992). (If the claim of a shipper that it is not bound by the bill of lading between its intermediary and a carrier is accepted, "a carrier, to avoid expanded liability, would have to contract to limit liability not only with the party with whom it actually dealt, but also with all others who might possess an interest in the shipped goods."); *Carman Tool* ("It would be next to impossible for a carrier to give actual notice of the liability limitations to everyone a court might later hold has a foreseeable economic interest in the goods. It could also substantially delay shipment . . ." 871 F.2d at 901). *See also Nippon Fire & Marine Ins. Co., Ltd. v. Skyway Freight Sys., Inc.*, 235 F.3d 53, 61-62 (2nd Cir. 2000)(Shipper bound by liability limitations in contracts between primary and secondary carriers).

Railroads take into account the very custom and practice, and commercial norms, that these decisions recognize when undertaking arrangements of their own role in international transportation. In contracting with ocean carriers, railroads establish rates under which they will ship the goods with the expectation that, as is customary, the ocean carriers from whom the goods are accepted have taken on limited liability and, through Himalaya clauses, have passed those limits

along to inland carriers. If the arrangements that have served historically to limit railroad liability become inoperative when a freight forwarder enters the picture, railroads will no longer be able to enter into international transportation arrangements with assurance they have foreclosed exposure to unforeseen and unpredictable liability to unknown parties. Consequently, they may be compelled to require from the prior party a defensive indemnity against liability in excess of the contractual limit set forth in their own contracts. In turn, the other parties involved in the ocean movement of the lading may take similar action. The creation of these linked indemnities will result in a cascade of parties being drawn into litigation if the shipper/insurer is able to bypass the freight forwarder's/ocean carrier's limitations of liability and proceed against the railroads or some other party involved in the transportation for excess recoveries.

Other alternatives are even less attractive and, like the indemnity option, will lead to serious economic inefficiencies. Given the nature of international shipments, it would be highly impractical to expect railroads to find a way to contract directly with parties with whom they would not ordinarily deal, which respondent suggests as an option for railroads wishing to assure they will benefit from the protection of liability limitations or other terms, a proposition of questionable feasibility and likely considerable expense.[8] This is precisely the reason that most courts have recognized that it is counterproductive to adhere to the fiction that the shipper is not bound by the terms of a bill of lading issued to the freight forwarder that has been engaged to arrange transportation for that shipper's goods.

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[8] See Resp. Br. in Opp. to Pet. at 21. Respondent also suggested that railroads forego participation in multimodal transactions. This would reduce competition in the inland phase of international commerce, an option that would be destructive of fundamental public policy, and, which for obvious reasons AAR's members will decline.

B. The Eleventh Circuit's Unduly Narrow Reading of the ICC Bill of Lading Cannot Be Squared With Either the Contract's Words or the Obvious Realities of the Underlying Transaction

Though the bill of lading between ICC and Kirby did not serve as the basis for the district court's grant of partial summary judgment, it too can only be reasonably interpreted to benefit petitioner. However, notwithstanding that petitioner did provide "services used to perform the contract," the Eleventh Circuit reasoned that petitioner was not covered by that phrase because it did not contract (was not in privity) with the carrier (freight forwarder). 300 F.3d at 1308-10. In reaching this decision, the distinction posited by the Eleventh Circuit between "relational" terms and "descriptive" terms when used in a Himalaya clause turns a blind eye to the business realities of this case and international commerce in general. When a contract of carriage by its very nature calls for both ocean and land transportation, it is well within the contemplation of the contracting parties that, of necessity, the subcontractors involved will include a land-based carrier like a railroad. A contract that plainly extends liability limitations (or any terms) to other parties that will be performing the services contemplated by the contracting parties—in this case, shipment of cargo from Australia to (inland) Alabama—must be enforced in accordance with a reasonable understanding of its terms if established means of doing business are to be maintained.

Notwithstanding this Court's admonition that Himalaya clauses should be narrowly construed, *Robert C. Herd & Co. v. Krawill Mach Corp.*, 359 U.S. 297 (1959), a distinction must be recognized between construing a clause narrowly by limiting it to the reasonable meaning of the words used and interpreting a clause contrary to the intent and expectations of the parties. There is no rational basis for reading petitioner, a

railroad, out of the Himalaya clause through a privity requirement. The railroad was not a remote entity whose involvement was too far removed to be contemplated by the parties. Rather, the railroad was an essential party that was fully contemplated by the shipper, and without which the services could not have been completed. As Judge Siler, whose dissent properly recognized the commercial realities of multimodal international transportation, pointed out: "When the bill of lading between Kirby and ICC was issued, Kirby knew that an inland carrier would have to be used, because of the destination being Huntsville, Alabama." 300 F.3d at 1312. Given this clear understanding, the Eleventh Circuit's privity requirement is properly seen as an artificial technicality that subverts the intent of the parties and undermines the effectiveness of the prevailing means by which carriers and shippers generally conduct their business.

Any cargo owner that wishes to ship its goods to an inland location on the other side of the globe enters into the transportation contract with full appreciation of the kinds of services that will be required to complete the transportation. With this appreciation, Kirby chose to decline to declare a value for its goods and pay a higher freight rate, opting instead to insure the goods for their full value. These decisions were reflected in both bills of lading which were the subject of the Eleventh Circuit's opinion.

This Court should issue a ruling that will hold parties shipping goods in international commerce to the bargains they enter into. Shippers should not be empowered to opt for lower rates, and the associated liability limitations, by failing to declare a higher value of the goods shipped, but to then avoid the consequences of those decisions by seeking full recovery from downstream carriers.[9] Such a ruling would

[9] In actuality, such a ruling is most likely to prevent maritime insurers from reaping a windfall by evading the contractual limitations on damages against which they insured the shippers and upon the basis of which they establish their premiums. *See Carman Tool*, 871 F.2d at 901, n. 10.

properly avoid placing on downstream carriers the untenable burden of policing bills of lading over which they have no opportunity to negotiate or the nearly impossible task of ascertaining the nature and value of all the containerized goods they ship.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted

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No. 02-1028

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY PTY LIMITED D/B/A KIRBY ENGINEERING AND ALLIANZ AUSTRALIA LIMITED,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PROFESSORS FRANCESCO BERLINGIERI (ITALY), PHILIPPE DELEBECQUE (FRANCE), SARAH DERRINGTON (AUSTRALIA), RALPH B.T. DE WIT (BELGIUM), TOMOTAKA FUJITA (JAPAN), HANNU HONKA (FINLAND), IN HYEON KIM (KOREA), DAVID MORÁN BOVIO (SPAIN), PAUL MYBURGH (NEW ZEALAND), FRANCIS M.B. REYNOLDS (ENGLAND), JOHAN SCHELIN (SWEDEN), AND GERTJAN VAN DER ZIEL (THE NETHERLANDS) AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS

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May 28, 2004

QUESTION PRESENTED

This brief responds to the first question presented in the Petition for a Writ of Certiorari:

> Whether a cargo owner that contracts with a freight forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with carriers to provide that transportation.

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors from twelve major commercial maritime nations who are expert in the law of international goods transport. They currently teach, or have spent their professional careers teaching, maritime law and related subjects at the leading law schools in their home countries and, as visiting professors, at law schools around the world. They have written about the subject extensively, and their works include some of the principal treatises on the matters at issue in this case. They have been recognized by their governments as authorities who are well-suited, both by their interests and by their expertise, to work in international fora to achieve greater uniformity in goods transport law.

Several *amici* have served on the Legal Committee of the International Maritime Organization (IMO), the permanent international body established under U.N. auspices in 1948 to promote maritime safety and the prevention of marine pollution.

Several *amici* have represented their national maritime law associations in the Comité Maritime International (CMI), a private non-governmental organization established in 1897 "to contribute by all appropriate means and activities to the unification of maritime law in all its aspects." CMI Constitution, art. 1. More specifically, these *amici* have served on the International Sub-Committee on Uniformity of the Law of Carriage of Goods by Sea, which met from 1995 to 1998, or on the International Sub-Committee on Issues of Transport Law, which has met since 2000, or on both. The current Transport Law Sub-Committee was established in response to an invitation from the United Nations Commission on International

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[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than the University of Richmond School of Law, which paid for the printing of this brief through Professor Jones's research account, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of the parties, reflected in letters on file with the Clerk.

Trade Law (UNCITRAL) asking the CMI to undertake the preparatory work for a new international convention governing the carriage of goods by sea. In December 2001, the CMI submitted its proposed Draft Instrument to UNCITRAL.[2] *See* 2001 CMI Yearbook 532.

Most of the *amici* now serve on UNCITRAL's Working Group III (Transport Law), which has been meeting since the spring of 2002 to negotiate a new international convention governing the carriage of goods by sea (including multimodal shipments that include sea carriage). The Working Group's most recent session occurred earlier this month. As the Solicitor General notes, the United States is "an active participant" in this process. U.S. Brief at 2 n.1. Among the matters under discussion are the freedom of contract, the obligations of a carrier, and the rights and obligations of performing parties.

All twelve *amici* have participated in the current international process, either through the CMI or as members of the UNCITRAL Working Group; several have been active in both. The enhancement and unification of goods transport law world-wide is thus an avocation and a mission for *amici*. They regard the integration of the law of the United States into the larger international scheme to be vital to the success of their endeavors. For this reason, *amici* desire to bring to this Court's attention the rule of law that by international consensus governs relations among shippers, agents, other intermediaries, carriers, and vessel owners in the carriage of goods by sea.

Together with the United States, the twelve major commercial maritime jurisdictions represented here have long been focal points for the refinement of the governing law and centers for the resolution of related disputes.

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[2] UNCITRAL made only minor changes to convert the CMI's draft into its own Preliminary Draft Instrument on the Carriage of Goods by Sea, which it published in U.N. Doc. A/CN.9/WG.III/WP.21 (2002). This draft became the basis for the discussions in UNCITRAL's Working Group III (Transport Law), mentioned in the next paragraph of the text.

For the Court's information, more specific biographical information for each of the *amici* is included in the appendix.

SUMMARY OF ARGUMENT

In the twelve major commercial maritime nations represented by *amici*, a transport intermediary[3] acts either as an agent or as a principal — depending on the facts of the case — and no legal rule requires an intermediary to act as an agent when it has not agreed to do so. When an intermediary acts as an "agent" to contract on behalf of its customer, the customer is bound by the contract between the intermediary agent and a third-party carrier, but when the intermediary assumes for itself the carrier's role in a contract with its customer, the customer will not be bound by a contract between that intermediary and another carrier. In *amici's* nations, an intermediary issuing a FIATA FBL would be recognized as a "principal" or "carrier" rather than as an "agent," and the intermediary's customer would not be bound by the contract between that intermediary and another carrier. For the sake of international uniformity, the law of the United States should be the same.

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[3] Because in English, the term "freight forwarder" is sometimes treated as synonymous with "forwarding agent," *see, e.g.*, Leo D'Arcy, Carole Murray, & Barbara Cleave, *Schmitthoff's Export Trade: The Law and Practice of International Trade* 605 n.8 (10th ed. 2000), its use here seems to risk confusion, if not to beg the question that lies at the heart of this case. Moreover, while the *amici* have in common the principles of transport law that they present here, their terminologies nevertheless differ, so that translation of their legal terms (*e.g.*, "*spedizioniere*," "*commissionnaire*," "*expediteur*," "*transitario*") with the term "freight forwarder" risks compounding the semantic problem with a linguistic one. For these reasons, it is convenient to take a cue from the Shipping Act of 1984, and employ in this brief the term "intermediary" to describe the party positioned in the transport chain between the shipper and one or more third parties who, depending on the circumstances, may be an agent or a carrier. *Cf.* 46 U.S.C. § 1702(17) (definition of "ocean transportation intermediary").

ARGUMENT

Petitioner Norfolk Southern argues that respondent Kirby is bound by the contract of carriage that ICC, an Australian intermediary, concluded with Hamburg Süd, an ocean carrier. This argument is based on the theory that because ICC was an intermediary it must have acted as Kirby's agent when it contracted with Hamburg Süd, and that Kirby was accordingly bound as an undisclosed principal.

Throughout the commercial maritime nations of the world, the law is directly contrary to the railroad's position in this case. Although the term "freight forwarder" was once understood in many countries to imply an agency relationship, the industry and the law have both advanced to the point that the law now recognizes the industry's need for freedom of contract and flexibility in structuring transactions. Whether an intermediary is the shipper's agent today depends on the intent of the two contracting parties as indicated by all of the circumstances in each case.

In this case, Kirby contracted only with ICC. They concluded a contract of carriage evidenced by the bill of lading that ICC issued to Kirby, and ICC was the "carrier" — a principal, not an agent — under this contract.

I. IN THE TWELVE MAJOR COMMERCIAL MARITIME NATIONS REPRESENTED BY *AMICI*, AN INTERMEDIARY ACTS *EITHER* AS AN AGENT *OR* AS A PRINCIPAL — DEPENDING ON THE FACTS OF THE CASE — AND NO LEGAL RULE REQUIRES AN INTERMEDIARY TO ACT AS AN AGENT WHEN IT HAS NOT AGREED TO DO SO

Amici are aware of no legal rule in any country that *requires* an intermediary to act as an agent when it has not agreed to do so. Minor differences in approach or terminology should not obscure the underlying uniformity on the basic principle.

A. The Major Common-Law Systems, Applying Familiar Rules of Agency Law, Permit an Intermediary to Act *Either* as an Agent *or* as a Principal

Professor Clive Schmitthoff, one of the twentieth century's leading English experts on the law of international trade, succinctly explained the current role of intermediaries under English law:

> A forwarder may act as a principal or as an agent. Historically, forwarders acted as agents on behalf of their customers [and for this reason they were known as forwarding agents] but the practice has changed and in modern circumstances they often carry out other services .... Often they act as carriers. It follows that, in law, they may qualify more often as principals than as agents. Nevertheless, it has to be ascertained in every individual case in which legal capacity the forwarder acted. The answer depends on the construction of the contract between the forwarder and his customer and the facts of the case.

Clive M. Schmitthoff, *Schmitthoff's Export Trade: The Law and Practice of International Trade* 302 (9th ed. 1989).[4]

Professor Schmitthoff proceeds to discuss some of the factors that might indicate whether a particular intermediary is a carrier or an agent (such as charging either a commission, which would tend to indicate agency, or an "all-in" price, which would tend to indicate that it was acting as a principal), *id.* at 303, but he notes that no one factor is decisive. He concludes that determining

> whether the forwarder has acted as carrier, *i.e.*, as principal, or as forwarding agent ... is always a question of construction of the contract and the facts .... Bean J. expressed this conclusion, when observing

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[4] Professor Schmitthoff's words here and in the quoted passages following have been adopted by the authors of the current edition of his book. *See* D'Arcy, *supra* at 605-06.

> that "at the end of the day it was very much a matter for the trial judge whether forwarding agents were in fact acting as agents or principals."

Id. at 304 (quoting *Hair & Skin Trading Co. v. Norman Airfreight Carriers Ltd.*, [1974] 1 Lloyd's Rep. 443, 445 (Q.B.) (Bean, J.)). *Accord, e.g.*, Francis M.B. Reynolds, *Bowstead and Reynolds on Agency* ¶ 9-024 (17th ed. 2001); Stewart Boyd, Andrew Burrows & David Foxton, *Scrutton on Charterparties and Bills of Lading* 55 n.75 (20th ed. 1996); *Aqualon (UK) Ltd. v. Vallana Shipping Corp.*, [1994] 1 Lloyd's Rep. 669 (Q.B. (Com. Ct.) 1993) (noting that "forwarding agents ... act in very many capacities, including contracting for carriage as principals," and adding "that this is also well understood in the trading environment").

Other common-law countries have followed the example of English law in this regard. The premier Australian treatise on maritime law describes the intermediaries' shift away from their traditional agency role:

> [F]reight forwarders have been held to have contracted as carrier, and not merely as agent, particularly where they provide a "door to door" service involving carriage to and from the port at either end of the sea carriage.

Martin Davies & Anthony Dickie, *Shipping Law* 338 (2d ed. 1995); *see also id.* at 168 (noting that a "forwarder may be acting merely as agent for the cargo-owner" or it "may have contracted with the cargo-owner as principal").

The general position of New Zealand, like that of England and Australia, is that an intermediary may act as an agent or it may assume the liability of a carrier. *See EMI (New Zealand) Ltd. v. William Holyman & Sons Pty Ltd.*, [1976] 2 N.Z.L.R. 566 (H.C.). *See also, e.g., Emery Air Freight Corp v. Nerine Nurseries Ltd.*, [1997] 3 N.Z.L.R. 723, 725 (Henry, J.), 732-33 (Blanchard, J.) (Ct. App.) (holding that a freight forwarder was acting as a carrier rather than merely acting as "a forwarding agent"; explaining that the description "freight forwarder" should not be taken out of context, and was not determinative of legal status as either carrier or agent).

B. In Civil-Law Systems, the Relevant Codes Permit an Intermediary to Act *Either* as an Agent *or* as a Principal

In civil-law countries, the legal framework is somewhat different, and thus the analysis looks not to common-law agency principles but to a tradition descended from Roman law and found in provisions of the relevant codes (typically the Civil Code or the Commercial Code). The substantive results are nevertheless consistent with the conclusions reached by the Eleventh Circuit in the decision below.

1. Under Italian law, for example, a shipper may enter into a contract of carriage with a carrier directly, or else through an intermediary acting as an agent. In this context, the law recognizes not only the traditional form of agent, who acts on the shipper's behalf to procure a contract in the shipper's name with a carrier, but also the "forwarding agent", or "*spedizioniere.*" The forwarding agent acts on the shipper's behalf pursuant to a contract with the shipper, called a "forwarding contract" or "*contratto di spedizione.*" On the shipper's behalf, but in the forwarding agent's own name, the forwarding agent then pursues a second contract, "*contratto di trasporto*", with a carrier. Article 1737 of the Italian Civil Code provides:

> The forwarding contract is an agency (agreement) pursuant to which the freight forwarder undertakes to stipulate, in its own name and for the account of the principal, a contract of carriage and to perform the ancillary operations.

It follows that the general provisions of the Italian Civil Code on agency agreements apply, except where they are superseded by specific provisions in the forwarding contract.

In the particular context of goods transport, the forwarding agent is a variant of the more general term,

"commission agent." The civil law's commission agent has no analog in common law. In civil law, there is an agency relationship between a forwarding agent and the shipper, but the forwarding agent is a principal with respect to the carrier, and the shipper can neither sue the carrier nor be sued by the carrier. *See* Bowstead & Reynolds, *supra* at ¶ 1-020.

In Belgium, such a forwarding agent is called a "*commissionair expediteur*," *see* I Commercial Code Tit. 7 (Belgium), and the forwarding contract is likewise an agency agreement. In the Netherlands, the forwarding agent is an "*expediteur*," and the forwarding contract is also an agency agreement. *See* Civil Code 8:60 (Netherlands).

On the other hand, in Italy (as elsewhere) the intermediary may undertake to perform the carriage with its own means of transport -- or by subcontracting to use the services of others. In this situation, the intermediary assumes all of the obligations of a carrier and article 1741 of the Italian Civil Code applies:

> The freight forwarder who, with its own or others' means, undertakes to perform in whole or in part the transport shall have the obligations and the rights of the carrier.

This undertaking changes the legal nature of the contract between the shipper and the intermediary from "*contratto di spedizione*" (forwarding contract) to "*contratto di trasporto*" (contract of carriage).

Article 1741 is so clear that the proposition is seldom considered by the jurisprudence, but two recent decisions of the Italian Supreme Court (Court of Cassation) confirm this. In *Gondrand SNT v. Gastaldi & C. S.p.A.*, Mar. 6, 1997, n.1994, 1998 *Diritto Marittimo* 394, the Court of Cassation noted that when the shipper and the intermediary agree on a global remuneration, the problem arises of establishing whether the parties intended to conclude a "*contratto di trasporto*" (contract of carriage) or a "*contratto di spedizione*" (forwarding contract). The court held

that when the intermediary undertakes to perform the carriage, it clearly indicates that the parties intended a contract of carriage, rather than a forwarding contract.

In *Società Italiana di Assicurazioni Trasporti SIAT S.p.A. v. Grandi Targhetti Navigazione S.p.A.*, Aug. 13, 1997, n.7556, 1998 *Diritto Marittimo* 406, the Court of Cassation, before taking up the question of whether the particular intermediary had acted as a carrier, stated the following:

> It is advisable to start with the indication of the difference that exists between the contract of carriage and the forwarding contract, such difference consisting in the fact that whilst in the former contract the carrier undertakes to perform the carriage with its own means or with the means of others, taking upon himself all the risks of the performance of the contract, in the latter instead the freight forwarder only undertakes to stipulate with others, in his own name but for the account of his principal, a contract of carriage.

Thus in Italian law, the nature of the contract between shipper and intermediary in each case depends on the intent of the parties. When their intent is not expressed adequately, the court is left to infer it from the facts.

The same is true in the Netherlands. An intermediary may assume the role of carrier as opposed to the role of agent. The former role leads to a contract of carriage as defined in Civil Code 8:20; the latter to a contract for the arranging of carriage as defined in Civil Code 8:60.

In Belgian law, it is also true that an intermediary may assume the role of carrier as opposed to the role of agent. Unlike Dutch law, Belgian law still distinguishes between a nominal carrier and one who actually performs the carriage. While the distinction persists in terminology, it does not translate into a difference at law; the nominal or contracting carrier is at law the equal of the actual carrier. In both Belgium and the Netherlands, whether in a particular case an intermediary has acted as carrier or

agent is a question the courts will decide based on the intent of the parties. *See Gijsbers v. Schiphoff* (Kribbebijter), Hoge Raad, Mar. 11, 1977, 1977 N.J. 521 (Sup. Ct. Netherlands). The question can cut both ways. *See* The Hague Court of Appeal, 14 Sept. 1979, 1979 S. & S. 121 (where a freight forwarder had concluded a contract of carriage in its own name without explicitly mentioning its principal, and the bill of lading named the principal as the shipper, the contract of carriage was between the principal and the carrier) and The Hague Court of Appeal, 17 Dec. 1991, 1992 S. & S. 131 (where a forwarder had concluded a contract of carriage in its own name without explicitly mentioning a principal, facts relating to an earlier, identical shipment proved the carrier knew that the forwarder acted as agent on behalf a named principal, and the custom of forwarders acting on behalf a principal both led the court to conclude that the contract of carriage was made between the named principal and the carrier).

2. The Nordic countries are unanimous on this point. In 1994, Denmark, Finland, Norway, and Sweden enacted virtually identical maritime codes, and they all distinguish a contracting carrier from an actual carrier. A contracting carrier is one who concludes a contract with the shipper. Whether a person performing transport services is acting as an agent or as a carrier is a matter to be determined on a case-by-case basis. When it is not made sufficiently clear in the contract, it may be inferred from various facts, including the pattern or practice of dealings between the parties as well as that in the trade more generally. In the Danish case of *The Flexen*, 1989.123 (Mar. & Commercial Ct.), where the same party had performed several tasks of transport for the same customer but had not clearly assumed the role of agent, it was held to be a carrier. In a case in which the intermediary issued a bill of lading covering not only sea transport but also ancillary land transport, and its sub-contractors issued their own transport documents naming the intermediary as shipper, the Supreme Court of Sweden held the intermediary to be a carrier. *See* 1996 N.J.A. 211.

3. The laws of Japan and Korea are in accord on these matters with those of the European and Nordic jurisdictions with civil-law traditions. Under section 99 of the Japanese Civil Code, an intermediary may, purely as the agent of a shipper, secure a contract between the shipper and a carrier. Alternatively, as a "forwarding agent" under article 559 of the Japanese Commercial Code, an intermediary may make a forwarding contract with the shipper as well as a contract for carriage with a third party. But, the intermediary may also contract on his own, as a carrier, with the shipper, as provided in article 570 of the Japanese Commercial Code.

The same alternatives exist in Korea. An intermediary, acting purely as the agent of a shipper, may secure a contract between the shipper and a carrier. Under article 114 of the Korean Commercial Code, an intermediary acting as a "forwarding agent" may make a forwarding contract with the shipper as well as a contract for carriage with a third party. Finally, article 116(2) of the Korean Commercial Code provides that when an intermediary issues its own bill of lading, it is conclusive evidence that the intermediary acted as a carrier. Although these provisions of the Commercial Code have force only for inland carriage, it is accepted that the same rules apply when an intermediary issues its own bill of lading for the carriage of goods by sea. *See* In Hyeon Kim, *Maritime Law Treatise* 63 (2002); Chang-Joon Kim, *A Study on the Legal Status of a Freight Forwarder* 36 (2004) (unpublished Ph.D. thesis, Kyoung-Yee University); Sang-Hyun Song & Hyun Kim, *Basic Text on Maritime Law in Korea* 209, 239 (1999).

C. Although French Law Analyzes the Situation Somewhat Differently, Using the Concept of the "*Commissionnaire*" (Commission Agent), the Substantive Result is the Same

French law recognizes three categories of intermediaries, as do the systems of many other civil-law countries. But in France only two of them are significant in practice.

In theory, an intermediary may undertake to perform the contract of carriage itself, and the carriage contract would then be binding on the two parties. *See* Code Civil [C. Civ.] art. 1134, al. 1 (Fr.). If the intermediary contracts with another carrier, however, and it is determined that the intent had been for the intermediary to organize the carriage rather than to perform the carriage, then the intermediary will be treated as a "*commissionnaire*" (commission agent) rather than as the carrier.

In practice, therefore, the important question is generally whether an intermediary is a "*transitaire*," corresponding to an intermediary acting as an agent in a common-law country, or a "*commissionnaire*" (commission agent). The former is governed by the articles of the French Civil Code on the agency contract with representation. *See* C. Civ. art. 1984 (Fr.). The latter is an "agency contract with no representation," *see* Commercial Code arts. L. 132-1 to 132-8 (Fr.). The consequences for an intermediary of being a "*commissionnaire*," however, are virtually the same as the consequences of being a carrier. The distinction in French law accordingly has the same practical consequence as the more familiar distinction between agents and principals/carriers.

In sum, the laws of commercial maritime nations throughout the world all agree that an intermediary is not always the agent of the shipper when goods are carried by a third party with whom the intermediary has contracted for carriage. Rather, the intermediary has the discretion to contract as a carrier with the shipper, regardless of whether the contracting carrier then carries or hires another carrier to do so instead. Whether an intermediary has assumed the role of an agent or acts on its own in its contract with the shipper is a matter to be decided everywhere on a case-by-case basis. When the intermediary has declared its role clearly in the shipping documents, that declaration is persuasive, but absent such a declaration or in the event of its ambiguity, all of the circumstances, including other communications, past dealings, and trade practices, are relevant to the determination.[5]

II. WHEN AN INTERMEDIARY ACTS AS AN "AGENT" TO CONTRACT ON BEHALF OF ITS CUSTOMER WITH AN UNDERLYING CARRIER, THE CUSTOMER IS BOUND BY THE CONTRACT THAT IT HAS CONCLUDED — THROUGH THE AGENCY OF THE INTERMEDIARY — WITH THE UNDERLYING CARRIER

In agency law, the agent's ability to bind its principal to a contract is one of the defining features of the relationship. Thus an intermediary acting as an agent binds its customer to the contracts that it has concluded on the customer's behalf. *Amici* do not understand this proposition to be disputed in this case, and the point is so basic that there is no need to dwell on it. Professor Schmitthoff explains the rule under English law:

> If the forwarder acts as the customer's agent, his duty is to procure with due diligence others who perform the carriage, storage, packing or handling of the goods. The customer, through the intermediaryship of the forwarder, enters into direct contractual relations with the others. In this case the forwarder is

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[5] The irreconcilable conflict between an intermediary's duty as an agent to act in the best interest of its principal the shipper on the one hand, and its self interest when it contracts with the shipper as between two principals on the other, *see* Reynolds, *supra* at ¶¶ 1-032, 1-034, leads to the same conclusion in both common law and civil law traditions: that an agent cannot be at once both agent and principal in relation to the same shipper. This is not to say, however, that an intermediary acting as an agent cannot then by contract consent to duties and liabilities apart from those conferred by agency, but that would necessarily depend on the agreement of the parties manifest in that contract. *See, e.g., Cory Brothers Shipping Ltd. v. Baldan Ltd.*, [1997] 2 Lloyds Rep. 58 (Cen. L. Cty. Ct. (B. L.)) (where the bill of lading named its customer as the shipper, a forwarding agent who accepts a quotation naming *it* as the customer also incurred personal liability for the freight).

> under the usual duties of an agent, unless they are modified by his contract with the customer....

Schmitthoff, *supra* at 303. Essentially the same approach is followed in all of the countries represented here. *See, e.g.*, French Civil Code art. 1984; Japanese Civil Code art. 99.

III. WHEN AN INTERMEDIARY ACTS AS A "PRINCIPAL" OR "CARRIER," ITS CUSTOMER WILL NOT BE BOUND BY THE SUBCONTRACT THAT IT CONCLUDES WITH ANOTHER CARRIER

When the intermediary acts as a "principal" or a "carrier," it is now acting for its own account rather than as an agent of its customer. When the intermediary subcontracts its duties under the contract of carriage, therefore, it is contracting for its own account — not binding its customer to its contracts with its suppliers. Once again, there are minor variations in analysis, but substantially the same result is reached in the *amici's* nations as was reached by the Eleventh Circuit in the decision below.

A. In the Major Common-Law Systems, There is no Privity Between a Shipper and Others with Whom an Intermediary Acting as Carrier has Contracted, so the Shipper is not Bound by the Terms of Such Contracts

Professor Schmitthoff once again supplies a concise explanation of English law:

> If the forwarder acts as a principal he enters into a contract of services with the customer. He is the only person with whom the customer is in contractual relations, even though the actual services, which the forwarder has undertaken, are carried out by others....

Schmitthoff, *supra* at 303.

Other common-law countries have continued to follow the example of English law. Professors Davies and Dickie explain the rule in Australia as follows:

> Where the freight forwarder is the contractual carrier, ... [t]he forwarder contracts with both the shipper and the sea-carrier as principal. *The shipper is not a party to the contract between the forwarder and the sea-carrier under the sea-carrier's bill of lading.* Conversely, the sea-carrier is not a party to the contract between the shipper and the forwarder but is merely a sub-contractor of the forwarder.

Davies & Dickie, *supra* at 338; *see also id.* at 168 (explaining that if "the forwarder [has] contracted with the cargo-owner as principal, promising to carry the goods to their final destination, [then] the bill of lading ... contract between the forwarder and sea-carrier is a sub-contract by the freight forwarder as principal, rather than as agent for the cargo-owner").

B. In Civil-Law Countries the Shipper Will not be Bound by the Subcontracts of an Intermediary that has Assumed the Role of Carrier in its Contract with the Shipper

In Italian law, the intermediary who acts in its own name cannot bind the shipper in its subcontracts with others. According to article 1705 of the Italian Civil Code:

> The agent who acts in its own name acquires all rights and assumes all obligations arising out of the contracts entered into with third parties, even if they had knowledge of the agency.
>
> Third parties have no privity of contract with the principal. However the principal may, acting in place of the agent, exercise the rights arising out of the performance of the agency, except where this may adversely affect the rights best owed to the agent by the provisions that follow.

In the Nordic countries, the carrier cannot bind the contracting shipper to another contract, *i.e.*, a subcontract.

In Japan, when an intermediary contracts with the shipper as a carrier, and then subcontracts with a third party to perform the carriage, there is no contractual rela-

tionship between the shipper and the third party. Two contracts independent of each other are the result, and no relationship binds the shipper with the third party. In *Fuji Fire & Marine Insurance Co. v. Mitsubishi Logistics Corporation*, 1008 Hanrei Times 288 (Tokyo D. Ct. June 22, 1999), an NVOC issued a FIATA bill of lading to the shipper and subcontracted with a warehouse for storage pending their loading. While warehoused, the goods were damaged. The shipper's subrogated insurer sued the NVOC and the warehouse. The warehouse sought to rely on an exemption clause in its "Port and Harbor Operation Contract Form," but this was not binding on the shipper because it was not in privity with the warehouse. The court therefore decided the case strictly on tort principles.

In Korea, when the intermediary enters into both a forwarding contract with the shipper and a carriage contract with a third party, the shipper has no claim in contract against the third-party carrier. *See* Case No. 97na17154 (Seoul D. Ct. Oct. 28, 1999).

A recent decision of the Korean Supreme Court confirms that the same result would follow when the intermediary acted as a carrier. *See* Case No. 99da55052 (Sup. Ct. Mar. 18, 2000). An intermediary issued its own bill of lading to the underlying shipper (just as ICC did in the present case), and then obtained the ocean carrier's bill of lading when it subcontracted for the carriage of the goods (just as ICC obtained Hamburg Süd's bill of lading in the present case when it subcontracted with Hamburg Süd). Rather than the usual form, however, the intermediary was listed in the consignor column of the ocean carrier's bill of lading as having acted "on behalf of" the cargo owner. When the goods were damaged during the custody of the ocean carrier, the subrogated cargo insurer sued the ocean carrier and sought to rely on the contract. The Korean Supreme Court rejected this claim. Having issued its own bill of lading to its customer, the intermediary had acted as a carrier. No matter what the ocean carrier's bill of lading said, the intermediary could not act as the cargo owner's agent when it had contracted with the cargo

owner as a principal. Thus there was no binding contract between the cargo owner and the ocean carrier, and the contractual claim against the ocean carrier failed.

C. In France, the Shipper Will not be Bound by the Contracts that a "*Commissionnaire*" (Commission Agent) Concludes with the Underlying Carriers

As explained above, *see supra* at 11-13, the key distinction under French law is not between the intermediary as "carrier" and the intermediary as "agent," but rather between the intermediary as "*commissionnaire*" (commission agent) and the intermediary as a "*transitaire*" under the provisions of the French Civil Code on the agency contract with representation. Thus an intermediary that would qualify as a carrier under another legal system would be a "*commissionnaire*," subject to a carrier's liabilities, in France.

It is well established under French law that the shipper is not bound by the contract that a "*commissionnaire*" concludes with an underlying carrier. For example, if the "*commissionnaire*" has not paid the freight due to the carrier, the carrier is unable to collect from the underlying shipper because there is no contract between them. *See, e.g.*, Cass. com., Dec. 9, 1997, 1998 Bull. Civ. IV, No. 333; Cass. com., Dec. 8, 1998, 1999 Droit Maritime Français 152. Similarly, if the underlying shipper wishes to sue the carrier for damage to the cargo, it must do so in a quasi-tort action; it has no remedy in contract. *See, e.g.*, Cass. com. June 12, 1872, D.P. I, 1872, 216; Cass. com. April 13, 1874, D.P. I, 1876, 255; Rodière, *Traité général de droit maritime*, Dalloz, t. 3, no. 936.

IV. IN *AMICI'S* NATIONS, AN INTERMEDIARY ISSUING A FIATA FBL WOULD BE RECOGNIZED AS A "PRINCIPAL" OR "CARRIER" RATHER THAN AS AN "AGENT," AND THE INTERMEDIARY'S CUSTOMER WOULD NOT BE BOUND BY THE SUBCONTRACT THAT IT CONCLUDES WITH ANOTHER CARRIER

Under the laws of commercial maritime nations throughout the world, the agency or principal status of an intermediary is a matter to be decided on a case-by-case basis in light of all of the circumstances. The Eleventh Circuit, in its decision below, carefully examined factors that would be relevant to making this decision anywhere, and concluded that every factor pointed to the conclusion that ICC had acted as a principal, not an agent, in its dealings with Kirby. In the view of the *amici*, the courts in each of their countries would have reached the same conclusion as the Eleventh Circuit.

First, in the common-law countries, that an intermediary has acted as an agent or as a principal "can only be a matter for interpretation." *Reynolds*, *supra* ¶ 9-024. An excellent summary of the position in all of the common-law countries was published thirty years ago in *Halsbury's Laws of England*:

> The fact that a person describes himself as a forwarding agent is not conclusive; and it is a question of fact to be decided according to the circumstances of each case whether a person normally carrying on business as a forwarding agent contracts solely as agent so as to establish a direct contractual link between his customer and a carrier (or possibly with several carriers, each undertaking a different part of the transit), or whether he contracts as principal to carry the goods, the customer appreciating that he will perform the contract vicariously through the employment of subcontractors. The nature of the carriage, the language used by the parties in describing the role of the person concerned, and any course of dealing between the parties will be relevant factors.

5 *Halsbury's Laws of England* ¶ 442 (4th ed. 1973) (footnotes omitted). The current edition continues to present this as the law of England in substantially the same language. *See* 5(1) *Halsbury's Laws of England* ¶ 575 (4th ed. reissue 1993). This precise passage was adopted by the Supreme Court (now the High Court) of New Zealand as accurately describing New Zealand's law in *EMI (New Zealand) Ltd. v. William Holyman & Sons Pty Ltd.*, [1976] 2 N.Z.L.R. 566, 572-573.

Under Australian law, Professors Davies and Dickey have stressed two indicia of an intermediary's acting as a principal: the fact that an intermediary has "promis[ed] to carry the goods to their final destination," Davies & Dickie, *supra*, at 168, and the intermediary's provision of "a 'door to door' service involving carriage to and from the port at either end of the sea carriage," *id.* at 338. Second, the civil code countries also contain principles that would give due recognition to the FBL as a carrier document, and thus would preclude a finding of partial agency by the intermediary on behalf of the shipper. Under article 1741 of the Italian Civil Code, for example, that result is undeniable because ICC "with its own or others' means, undert[ook] to perform in whole or in part the transport." Similarly, under the laws of both the Netherlands and Japan, the issuer of a FIATA FBL must be a carrier because the particular provisions of that bill pertaining to the freight forwarder's liability for cargo's loss or damage, articles 6.1-6.6, are incompatible with the ordinary responsibility of an agent.

The General Conditions of the Nordic Association of Freight Forwarders (NSAB 2000)[6] are widely used in Scandinavia. According to section 2-A, an intermediary is liable as a carrier when it performs the carriage of goods

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[6] English translation *available at* http://dasp.dk/docs/jura/nsab_2000/nsab2000_uk.asp.

by its own means of transport (performing carrier), or when it has expressly or impliedly accepted liability as carrier (contracting carrier), and an intermediary shall be considered a contracting carrier when it has issued a transport document in its own name or, when marketing or describing its offer, it has formulated its undertaking in such a way (*e.g.*, quoting its own price for the transport) that it can be reasonably assumed that it has undertaken a liability as carrier. All of these factors confirm that ICC acted as a principal in this transaction.

Under article 116(2) of the Korean Commercial Code, ICC would be considered to be unambiguously a "carrier" because it issued its own bill of lading. The Dutch courts likewise have left no doubt that the contract evidenced by a FIATA FBL is a contract of carriage, from which it follows inescapably that the party issuing the FBL must be a carrier. *See* The Hague Court of Appeal, 9-1-1987, 1989 S. & S. 26; *id.* at 28-3-1995, 1996 S. & S. 3. Recent decisions of the Dutch Supreme Court appear to accept this view. In *The Hanjin Oakland*, Hoge Raad 12 September 1997, NJ 1998, 687, for example, the Supreme Court seems to have taken for granted that the non-vessel owning intermediary that issued a FIATA FBL was a carrier and not an agent.

In this case, the key facts are precisely those found with the FBL – an intermediary's agreement to act as a principal to carry the goods.

The law of the United States ought to be the same, in order that the law of the major jurisdictions cooperating in ocean commerce may remain uniform. No subject matter deserves uniformity more than international goods transport. As this Court said in its most recent decision interpreting the Carriage of Goods at Sea Act, "Conflicts in interpretation of the Hague Rules not only destroy aesthetic symmetry in the international legal order, but impose real costs on the commercial system the Rules govern." *Vimar Seguros y Reaseguros, S.A. v. M/V. Sky*

Reefer, 515 U.S. 528, 537, 1995 AMC 1817, 1823-24 (1995).

This Court's decision is likely to have significant repercussions in the international community's understanding of the role of a transport intermediary and the proper construction of the underlying contracts of carriage. A decision affirming the Eleventh Circuit's judgment on Question 1 as presented in the Petition for a Writ of Certiorari would significantly promote efforts to attain the international uniformity that presently exists on this question.

CONCLUSION

The decision of the court of appeals should be affirmed on the agency question.[7]

Respectfully submitted,

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May 28, 2004

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[7] This brief expresses no view on the second question presented, which addresses the proper interpretation of the Himalaya Clause in the bill of lading that is binding on the respondents. Although major commercial nations uniformly agree on the proper answer to the first question presented, and *amici* are pleased to bring this answer to the Court's attention, there is no such universal uniformity on the second question presented. In many countries, the enforcement — even the relevance — of Himalaya Clauses often turns on unique aspects of national law or the mandatory application of international conventions to which the United States is not a party, particularly when the liability of non-maritime parties is at issue.

APPENDIX

The professors a*mici curiae* are:*

Francesco Berlingieri is a former professor of maritime law in the University of Genoa and President *ad honorem* of the Comité Maritime International. Antwerp University and the University of Bologna have both conferred on him the degree of Doctor Honoris Causa. He is also Honorary Professor of International Maritime Law of the IMO International Maritime Law Institute, and has served as Visiting Professor at Tulane University. He is an honorary member of the Order of the British Empire (OBE), the Canadian Bar Association, the British Maritime Law Association, the Association of Average Adjusters, and the Maritime Law Association of the United States. He serves as President of the Italian Association of Maritime Law, editor of CMI Publications, and editor of *Il Diritto Marittimo*. He is the author of a number of books and articles on maritime law in Italian, French and English. He was a member of the Commercial Court Committee of the High Court of Justice in London from 1977 to 1989. Professor Berlingieri chaired the CMI's Subcommittee on Uniformity from 1995 to 1998, and then represented the Maritime Law Association of Italy on the CMI's Subcommittee on Issues of Trade Law when those subcommittees laid the groundwork for the current process by which new rules for the carriage of goods by sea are now being negotiated under the auspices of UNCITRAL. Along with Francis Reynolds, *infra*, he is one of the three principal authors of the draft instrument adopted by UNCITRAL as the basis for those negotiations.

Philippe Delebecque is a Professor of law in the University of Paris Panthéon-Sorbonne (Paris-I), where he teaches contract law, international commercial law, maritime law and transportation law. He is a member of the

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* The current affiliations of these *amici* are provided for identification purposes only. The views expressed here by the *amici* are not intended as expressions of the views of their affiliated institutions.

board of World Maritime University and a member of the Maritime Arbitration Chamber of Paris and the French Association of Maritime Law. He is the author of *Traité de droit commercial* (with M. Germain), *Cours de droit du commerce international* (with M. Jacquet), and *Contrats civils et commerciaux* (with M. Collart). He serves as the Director of *Juris-Classeur Transports* and is a collaborator of the French review, *Droit maritime français*. He represents France in the UNCITRAL Working Group on Transport Law.

Sarah Derrington teaches maritime law at both undergraduate and post-graduate levels at the University of Queensland. She also teaches International Carriage of Goods in the LL.M. program at the University of Nottingham. She is a Barrister of the Supreme Court of Queensland, Barrister and Solicitor of the Australian Capital Territory, and a Registered Practitioner of the High Court of Australia, practicing shipping law exclusively. She has published in various journals, including Lloyd's Maritime & Commercial Law Quarterly, the Insurance Law Journal, the Journal of Maritime Law and Commerce, the maritime law area of the Laws of Australia and the Butterworth's Supreme Court Forms, Precedents and Pleadings and has written a chapter in The Modern Law of Marine Insurance. She is a member of the Board of Directors of the Maritime Law Association of Australia and New Zealand (MLAANZ) and has represented Australia and New Zealand in the CMI's work on uniform rules for the carriage of goods by sea and in relation to reform of the law of marine insurance.

Ralph B.T. De Wit is a Professor of Law at Brussels University (VUB), where he teaches contract law, transport law and private international law. He is also a practitioner at Antwerp, at the law offices of Van Doosselaere Advocaten. In addition to numerous articles in the Dutch language on the above mentioned subject matters, he is the author of Multimodal Transport, a comparative treatise on carriage of goods in six jurisdictions. He represents International Federation of Freight Forwarders Associations (in French "*Fédération Internationale des Associations de Transitaires et Assimilés*") (FIATA), and is a member of the UNCITRAL Working Group on Transport Law.

Tomotaka Fujita is a Professor of Law at the Graduate Schools of Law and Politics, University of Tokyo, where he teaches commercial law (including maritime and insurance law), corporate law, and law and economics. Since 1996, he has been a delegate of the Japanese Maritime Law Association in the CMI International Subcommittee for Uniformity of the Law of the Carriage of Goods by Sea and Issues of Transport Law. Among his published writings are Towards the Unification of the Law of International Carriage of Goods by Sea: A New Development at UNCITRAL in Jurist, The Future of Conflict of Laws in Maritime Law in the Japanese Yearbook of Private International Law, Recent Movements Toward the Unification of the Law of Carriage of Goods by Sea in the Seikei Law Review, and A New Regime for the Liability and Compensation for the Carriage of Dangerous Goods by Sea: The Adoption of the HNS Convention, in the Seikei Law Review. He represents Japan as a member of the UNCITRAL Working Group on Transport Law.

Hannu Honka is Professor of International Commercial Law at Åbo Akademi University where he directs the Institute of Maritime and Commercial Law. He also serves as legal counsel to the Finnish Shipbrokers' Association and as a member of the Council of the *Association Internationale de Dispacheurs Européens*. He is the Chairman of the working group preparing new hull insurance terms for Finland, and a member of the International Chamber of Commerce's Commission on International Commercial Practice, as well as its Commission on Carriage of Goods by Sea. He is also Finland's only average adjustor. He is the author of The Condition and Characteristics of the

Chartered Ship: A Study in Chartering Law, Shipping Dues in Finland, Punitive Damages in the United States, International Aspects with Special Reference to Admiralty, and co-author of New Carriage of Goods by Sea: The Nordic Approach Including Comparisons with Some Other Jurisdictions. He has published numerous articles in several languages on the law of maritime commerce and tort. He is a member of the boards of directors of the Centre for Maritime Studies (a joint venture of the University of Turku, Åbo Akademi University, and the Turku School of Economics and Business Administration) and of the Scandinavian Institute of Maritime Law in Oslo. He has served as a member of the Governmental Committee for the Revision of Rules on Carriage of Goods and Chartering in the Nordic Maritime Codes. He now serves as the President of the Finnish Maritime Law Association and represents Finland as a member of the UNCITRAL Working Group on Transport Law.

In Hyeon Kim, a licensed ship's captain with ten years of sea service, teaches maritime law, civil law, and marine traffic law at Mokpo National Maritime University, and serves as counsel to Choi & Kim, a leading maritime law firm. He is the author of Maritime Law Treatise and Maritime Law, and co-author of the Maritime Section of the Annotated Commercial Law. The subject of his Ph.D. thesis was the legal status of the freight forwarder, and he has published articles on maritime commercial law in the Korea Business Law Review and the Korea Maritime Law Journal. He represents Korea as a member of the Legal Committee of International Maritime Organization and in the UNCITRAL Working Group on Transport Law.

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Max Planck-Institut für ausländisches und internationales Privatrecht and Institut für Seerecht und Seehandelsrecht, as an Alexander von Humboldt research fellow and as a *Deutscher Akademischer Austauchdienst* (DAAD) guest researcher. Since 1994, he has served as Spain's National Correspondent for the Institute for Unification of Private Law in Rome (UNIDROIT). He served as plenipotentiary at the Diplomatic Conference in Vienna in 1999 and as Chairman of UNCITRAL in 1994, and as Vice Chairman of UNCITRAL in both 1993 and 2001, and as chair of working groups in 1993-1994 and 1995-2000. At present, he represents Spain as a member of the UNCITRAL Working Group on Transport Law.

Paul Myburgh teaches maritime law, conflict of laws, and international trade law at the University of Auckland. He is the author of the New Zealand transport law monograph in the International Encyclopaedia of Transport Law, has contributed a chapter to Ocean Bills of Lading: Traditional Forms, Substitutes, and EDI Systems, and has published numerous articles on maritime law in various international journals, including Lloyd's Maritime and Commercial Law Quarterly and the Journal of Maritime Law and Commerce. He is the New Zealand's correspondent for Lloyd's Maritime and Commercial Law Quarterly, *Anuario de Derecho Maritimo* and *Il Diritto Maritimo,* and the Shipping Law editor of the New Zealand Law Review. He also co-edits the New Zealand Business Law Quarterly and serves on the editorial board of the Baltic Maritime Law Quarterly. He is a member of the Maritime Law Association of Australia and New Zealand (MLAANZ) and represented the MLAANZ in the CMI's project to produce new rules for the carriage of goods by sea.

Francis M.B. Reynolds is a Professor of Law Emeritus in the University of Oxford and an Emeritus Fellow of Worcester College, Oxford, where he taught for more than forty years. He is also a Barrister and Honorary Bencher

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Johan Schelin teaches transport law at the University of Uppsala and at the University of Stockholm, where he also directs the Institute of Maritime and Transport Law. He has acted as an arbitrator in several transport law cases, and is the author of Flags of Convenience Vessels and Labour Conditions, Cargo and Compensation, and The Claim for Cargo Damages, as well as of numerous articles on transport law in Swedish and German journals. He represents Sweden as a member of the UNCITRAL Working Group on Transport Law.

Gertjan van der Ziel is a professor of law at Erasmus University in Rotterdam, where he specializes in maritime law. Before joining the academy, he acted for twenty years as general counsel for a major container line. He is the author of numerous articles in English and Dutch on international maritime law subjects, and a collaborator of the Netherlands' leading transport law journal. He is the President of the Netherlands' Maritime and Transport Law Association and Titular Member of the CMI, as well as a past Board Member of the Netherlands Trade Law

Association. He has represented the Netherlands at both the United Nations Conference on Trade and Development and the United Nations Commission for Europe in discussions pertaining to international maritime and intermodal trade, as well as at diplomatic conferences at which the 1974 Athens Convention relating to the Carriage of Passengers and Their Luggage by Sea and the 1976 London Convention on Limitation of Liability for Maritime Claims were concluded. More recently, he served as one of the three drafters producing for the CMI the draft instrument on transport law adopted by UNCITRAL. He now represents the Netherlands in the UNCITRAL Working Group on Transport Law.

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No. 02-1028

In The

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

JAMES N. KIRBY PTY LIMITED D/B/A/ KIRBY ENGINEERING AND ALLIANZ AUSTRALIA LIMITED,

Respondents.

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On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF PROFESSOR MARTIN DAVIES AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

This brief is limited to Question 1 in the Petition for Writ of Certiorari. That question is as follows:

> Whether a cargo owner that contracts with a freight-forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with carriers to provide that transportation.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Martin Davies is the Admiralty Law Institute Professor of Maritime Law at Tulane University. He has no financial interest in this case. He has written extensively on maritime law in the United States and Australia. He is a member of the Maritime Law Association of the United States and the Maritime Law Association of Australia and New Zealand.

Amicus has a particular interest in the issue raised by Question 1 of the Petition for Writ of Certiorari. He first addressed it in an academic writing in Australia in 1991,[2] and returned to consider it in the second edition of his treatise on Australian shipping law in 1995.[3] The third edition of that treatise, to be published in 2004, will contain an expanded consideration of the issue.

Amicus considered the U.S. law on the role of NVOCCs in an article published in the Tulane Law Review in 2000.[4] Part of that article was quoted with approval by

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[1] This brief as *amicus curiae* is submitted on behalf of Martin Davies. The parties have filed with the Court letters consenting to the filing of *amicus* briefs. In accordance with Supreme Court Rule 37.6, *amicus* certifies that this brief was authored by *amicus* and not, in whole or in part, by counsel for either party, and no person or entity, other than *amicus* and counsel submitting this brief on behalf of *amicus*, has made a monetary contribution to the preparation or submission of this brief.

[2] Martin Davies, *The Elusive Carrier: Whom Do I Sue and How?*, 19 AUST. BUS. L. REV. 230 (1991).

[3] MARTIN DAVIES & ANTHONY DICKEY, SHIPPING LAW v, 167-69, 337-340 (2d ed. 1995). The third edition of this treatise will be published in 2004; the issue is considered in that edition, also.

[4] Martin Davies, *In Defense of Unpopular Virtues: Personification and Ratification*, 75 TUL. L. REV. 337 (2000).

the U.S. Court of Appeals for the Ninth Circuit in *Kukje Hwajae Ins. Co. Ltd. v. M/V HYUNDAI LIBERTY,* 294 F.3d 1171, 1176 (9th Cir. 2002), *petition for cert. pending sub nom. Green Fire & Marine Ins. Co. Ltd. v. M/V HYUNDAI LIBERTY,* No. 02-813 (filed Nov. 22, 2002), to support a conclusion that conflicts with that of the U.S. Court of Appeals for the Eleventh Circuit in the present case on the issue presented by Question 1. In the present case, Petitioner cited *amicus'* Tulane Law Review article in its Petition for a Writ of Certiorari[5] and in its Brief on the Merits.[6] With due respect to the Ninth Circuit Court of Appeals and to Petitioner, the article does not support an affirmative answer to Question 1, as both suggest that it does.[7]

SUMMARY OF ARGUMENT

Question 1 cannot be given a uniform answer, positive or negative, that will apply in all cases as a matter of law. The term "freight forwarder" is sometimes used to describe

[5] Petition for Writ of Certiorari, p. 21.

[6] Brief of Petitioner, p. 38.

[7] Petitioner also misinterprets *amicus'* article as supporting the proposition that the vessel carrier "will often have no idea whether its shipper is a forwarder or owner." Brief of Petitioner, p. 38. The relevant passage says: "[T]he ocean carrier may have no idea that the person to whom it issued its bill is in fact an NVOCC that has issued bills of lading itself." Martin Davies, *In Defense of Unpopular Virtues: Personification and Ratification*, 75 TUL. L. REV. 337, 396 (2000). *Amicus'* point is that the ocean carrier may have no idea that the NVOCC has issued bills of lading itself, not that the ocean carrier may have no idea that it is dealing with an NVOCC.

an intermediary who contracts with a carrier as agent for the cargo owner, and sometimes to describe an intermediary who contracts as principal to carry the cargo owner's goods, then sub-contracts to other carriers. Question 1 could be answered affirmatively for the first type of intermediary, but not the second. An NVOCC who contracts as principal cannot be regarded as the cargo owner's agent in the strict sense of someone who is authorized to contract with others on the principal's behalf, because none of the usual indicia of true agency are present in the relationship between cargo owner and NVOCC. To bind the cargo owner to the NVOCC's contract with the ocean carrier always and in every case would have undesirable consequences, because it would mean that the cargo owner would have two carriage contracts and thus two freight obligations for one movement of its goods.

ARGUMENT

I. The answer to Question 1 depends upon the meaning of the term "freight forwarder" and the circumstances of the agreement between the cargo owner and the "freight forwarder."

The answer to Question 1 depends in large part on the meaning of the phrase "freight forwarder," which is not used uniformly in international shipping practice.

In the United States, Congress has defined the term "freight forwarder" to mean an intermediary who books or arranges carriage on behalf of cargo owners and processes the relevant documentation. 46 U.S.C. app. §1702(17)(A); 46 C.F.R. §515.2(o)(1). The term "non-vessel-operating common carrier" or NVOCC is defined as an intermediary

that undertakes as principal to carry the cargo owner's goods itself, but which sub-contracts carriage to vessel-operating common carriers (VOCCs). 46 U.S.C. app. §1702(17)(B); 46 C.F.R. §515.2(o)(2). Freight forwarders and NVOCCs share the quality of being interposed between the cargo owner and the VOCC, so Congress described them generically as "ocean transportation intermediary." 46 U.S.C. app. §1702(17); 46 C.F.R. §515.2(o). However, the statutory definitions make it clear that these are intermediaries of very different kinds so far as their contractual undertakings to the cargo owner are concerned. A "freight forwarder" merely undertakes to arrange carriage for the cargo owner and to process the relevant documentation. An NVOCC contracts to carry the cargo owner's goods to their destination.

Outside the United States, the term "freight forwarder" is used generically, in the way that the U.S. Code and Code of Federal Regulations use the term "ocean transportation intermediary." In other countries, it is quite possible for an entity called a "freight forwarder" to contract as principal with both the cargo owner and the ocean carrier who actually carries the goods to their destination. That is certainly true in Australia, where International Cargo Control Pty Ltd, the "freight forwarder" in the present case, carries on business. For example, in *Comalco Aluminum Ltd v. Mogal Freight Services Pty Ltd* (1993) 113 A.L.R. 677, the Federal Court of Australia said of the defendant that it "carries on business as a freight forwarder." *Id.* at 678. The Federal Court nevertheless went on to hold that the defendant was the carrier of the plaintiff's goods for the purposes of the Carriage of Goods by Sea Act 1991 (Austl.) (Australia's enactment of the Hague-Visby Rules), that the "consignment note" it had issued was a contract of carriage, and

that exclusion clauses in that carriage contract protected the defendant from liability in its capacity as carrier. *Id.* at 679-683, 695-700. The court specifically rejected the argument made on behalf of the defendant "freight forwarder" that it had entered into the contract with the ocean carrier as agent for the plaintiff and not as principal. *Id.* at 697.

Similarly, in *The CHITRAL* [2000] 1 Lloyd's Rep. 529 (Q.B.), the Commercial Court of the Queen's Bench Division in England considered the effect of a bill of lading issued to the cargo owner by an entity (IASC) that it described as "German freight forwarders." *Id.* at 530. The court noted that IASC was the contracting carrier under its bill of lading and that a court in Bremen, Germany had held that IASC's liability as carrier was "beyond question." *Id.* at 530, 532. This was so despite the fact that IASC had contracted with, and received a bill of lading from, the ocean carrier who had actually carried the goods. *Id.* at 530. Also, in *The BRIJ* [2001] 1 Lloyd's Rep. 431 (H.K.H.C.), an entity described by the court as "a freight forwarder" issued its own bill of lading to the plaintiff cargo owner and contracted with, and received a bill of lading from, the ocean carrier who actually carried the goods. *Id.* at 433. The Hong Kong High Court held that the cargo owner's contract of carriage was with the "freight forwarder," not the ocean carrier. *Id.* at 434-35.

In other cases, a "freight forwarder" outside the United States may indeed act merely as an agent for the cargo owner, entering into carriage contracts with ocean carriers (and land carriers) on the cargo owner's behalf. For example, in *Carrington Slipways Pty Ltd v. Patrick Operations Pty Ltd* (1991) 24 N.S.W.L.R. 745 (C.A.N.S.W.),

the New South Wales Court of Appeal held that an entity it described both as "freight forwarder" (*id.* at 749) and "forwarding agent" (*id.* at 747) had acted only as agent for the plaintiff cargo-owner when dealing with the ocean carrier who had actually carried the goods, and so could not be held liable as contracting carrier. *Id.* at 753.

This ambiguity about the meaning of the term "freight forwarder" means that judgments, opinions and briefs must be read with great care. Even within the United States, the term is not always used in the meaning given to it by Congress. Indeed, the ambiguity clouds the very question upon which the Court granted certiorari in the present case. Question 1 in the Petition for Writ of Certiorari uses the term "freight-forwarder" but it also speaks of a cargo owner contracting with such an entity "for transportation of goods to a destination in the United States."[8] If "freight forwarder" is being used there in the American statutory sense, then it is inappropriate to speak of contracting with such an entity *for transportation of goods*. One does not contract *for transportation* with a "freight forwarder" in the sense defined in 46 U.S.C. app. §1702(17)(A) and 46 C.F.R. §515.2(o)(1). Rather, a cargo owner contracts with a "freight forwarder" to arrange carriage for the cargo and to process the relevant documentation. Nevertheless, if "freight forwarder" means a forwarding *agent*, then the question obviously calls for an

[8] Petitioner's Brief on the Merits phrases Question 1 slightly differently, but with the same ambiguity: "Whether a cargo owner that contracts with a freight forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with the carriers that actually transport the owner's good." Brief of Petitioner, p. i.

affirmative response, because the cargo owner would be bound by the contract made by its agent on its behalf. In contrast, if "freight forwarder" is being used in Question 1 in the less precise international sense that prevails in Australia (where the contract between Respondent Kirby and International Cargo Control Pty Ltd was made), then the answer can only be: "It depends on whether the freight forwarder contracted with the cargo owner as principal or agent."

That is, indeed, the answer that would be given to Question 1 in other countries. In *Comalco Aluminum Ltd v. Mogal Freight Services Pty Ltd* (1993) 113 A.L.R. 677, 698, the Federal Court of Australia said, quoting from the leading British text, CLIVE M. SCHMITTHOFF, SCHMITTHOFF'S EXPORT TRADE 249 (8th ed. 1986):

> A forwarder may act as a principal or as an agent. Historically, forwarders acted as agents on behalf of their customers but the practice has changed and in modern circumstances they often carry out other services, such as packing, warehousing, cartage, lighterage, insurance, or, in container transport, the groupage or consolidation of parcels of various customers into one container. Often they act as carriers. It follows that, in law, they may qualify more often as principals than as agents. Nevertheless, it has to be ascertained in every individual case in which legal capacity the forwarder acted. The answer depends on the construction of the contract between the

forwarder and his customer and the facts of the case.[9] (footnotes omitted).

To avoid confusion, *amicus* will adhere strictly to the meaning of the terms "freight forwarder" and "non-vessel-operating common carrier" (or NVOCC) as defined by Congress. The definition of "ocean freight forwarder" in the U.S. Code and Code of Federal Regulations refers only to a person who "in the United States" books or arranges space with common carriers on behalf of shippers. 46 U.S.C. app. §1702(17)(A); 46 C.F.R. §515.2(o)(1). Even so, *amicus* will use the term "freight forwarder" in this sense for all intermediaries of this kind, whether in the United States or abroad. The term NVOCC will be used to describe an intermediary who contracts as carrier.

Two points should be reiterated about *amicus'* use of the American terminology. First, it does not reflect the international understanding of the meaning of the term "freight forwarder" and it therefore may not match the usage in other briefs, including the Respondents' own. As always, this Court's ruling will decide the position under American law, so it seems appropriate to use American terminology. Secondly, according to the American meaning of the terms, International Cargo Control Pty Ltd seems to have been an NVOCC, not a freight forwarder. As a result, Question 1 is inappropriately phrased for the circumstances of the present case. Using American terminology, the question should be whether a cargo owner is bound by

[9] The current edition of the late Prof. Schmitthoff's treatise retains this passage in exactly the same terms. *See* LEO D'ARCY, CAROLE MURRAY & BARBARA CLEAVE, SCHMITTHOFF'S EXPORT TRADE 605-06 (10th ed. 2000).

the contracts that *an NVOCC* makes with ocean carriers for transportation of the cargo owner's goods.

II. An NVOCC cannot be an agent in the strict sense.

Petitioner and the U.S. Court of Appeals for the Ninth Circuit in *Kukje Hwajae Ins. Co. Ltd. v. M/V HYUNDAI LIBERTY,* 294 F.3d 1171, 1176 (9th Cir. 2002), *petition for cert. pending sub nom. Green Fire & Marine Ins. Co. Ltd. v. M/V HYUNDAI LIBERTY,* No. 02-813 (filed Nov. 22, 2002) quoted from a section of *amicus'* Tulane Law Review article that was concerned with the maritime doctrine of ratification. Martin Davies, *In Defense of Unpopular Virtues: Personification and Ratification*, 75 TUL. L. REV. 337, 374-403 (2000) (hereafter *Unpopular Virtues*). The doctrine applies in cases where someone other than the ship's owner issues a bill of lading for carriage of goods on a ship. For example, a time charterer of the carrying ship may issue a bill of lading in its own name, even though it is not the shipowner. The shipowner is not bound *in personam* by such a bill of lading, because it is not a party to the contract evidenced by it. However, the doctrine of ratification holds that the carrying ship may be held liable *in rem* on a bill of lading that was not issued by or on behalf of the shipowner. *See, e.g., Demsey & Assocs., Inc. v. S/S SEA STAR*, 461 F.2d 1009 (2d Cir. 1972); *Cavcar Co. v. M/V SUZDAL*, 723 F.2d 1096 (3d Cir. 1983); *Cactus Pipe & Supply, Co. v. M/V MONTMARTRE*, 756 F.2d 1103 (5th Cir. 1985).

One of the two theoretical explanations for the doctrine of ratification is that the person other than the shipowner who issued the bill of lading acted as agent on the ship's behalf or can subsequently be treated as having

acted as agent for the ship. *Unpopular Virtues,* 75 TUL. L. REV. at 379. *Amicus'* article explains that the doctrine of ratification cannot bind a ship *in rem* to a bill of lading issued by an NVOCC, because an NVOCC does not act as agent on the ship's behalf and cannot subsequently be treated as having acted as agent. *Id.* at 395-400. The relevant passage reads:

> The NVOCC is not authorised by the owner or master of the carrying ship to issue bills of lading that will bind the ship; indeed, the ocean carrier may have no idea that the person to whom it issued its bill is in fact an NVOCC that has issued bills of lading itself. The relationship between ocean carrier and NVOCC is therefore not one of agency, but is a contractual one embodied in the ocean carrier's bill of lading, under which the NVOCC is the shipper. The NVOCC does not contract with the owners of the goods as agent for the ship. Quite the reverse, it contracts with the ocean carrier as agent for the owners of the goods. *Id.* at 396.

Taken in context, the final sentence of this passage means no more than that an NVOCC is an intermediary engaged by the cargo owner rather than by the ocean carrier. As the commentary to the Restatement (Third) on Agency notes, "It is . . . common usage to refer without distinction to parties who serve any intermediary function as 'agents.'" RESTATEMENT (THIRD) ON AGENCY § 1.01 cmt. b (Tent. Draft No. 2, 2001). The sentence was not intended to suggest that an NVOCC is an agent in the strict sense, an intermediary authorized to act on the cargo owner's behalf, subject to the cargo owner's control, and having consented so to act. RESTATEMENT (SECOND) ON AGENCY § 1 (1958); RESTATEMENT (THIRD) ON AGENCY § 1.01 (Tent.

Draft No. 2, 2001). Nevertheless, that is the way it was incorrectly interpreted by the Ninth Circuit in *Kukje Hwajae Ins. Co.* 294 F.3d at 1176, and by Petitioner in the present case.

Under ordinary principles of agency law, the existence of a true agency relationship is a question of fact. *Wood v. Holiday Inns, Inc.*, 508 F.2d 167 (5th Cir. 1975); *Bartlett-Collins Co. v. Surinam Navigation Co.*, 381 F.2d 546, 550 (10th Cir. 1967). Not even a freight forwarder is always the agent of the cargo owner as a matter of law. *Strachan Shipping Co. v. Dresser Indus., Inc.*, 701 F.2d 483, 488 (5th Cir. 1983); *Constructores Tecnicos, S. de R.L. v. Sea-Land Serv., Inc.*, 945 F.2d 841, 846 (5th Cir. 1991); *Naviera Neptuna S.A. v. All Int'l Freight Forwarders*, 709 F.2d 663, 665 (11th Cir. 1983). When considering whether a freight forwarder in fact acts as agent for the cargo owner, circuit courts have regarded the cargo owner's right to control the manner in which the forwarder performs its duties as the most important factor. *Strachan Shipping,* 701 F.2d at 488; *Constructores Tecnicos,* 945 F.2d at 846.

Nothing in the FIATA Multimodal Transport Bill of Lading standard form (the FBL) makes the NVOCC (there referred to as "the Freight Forwarder") subject to the cargo owner's control in the selection of ocean carriers and nothing authorizes the NVOCC to bind the cargo owner to contracts with ocean carriers. On the contrary, cl. 2.1(a) provides that the NVOCC (referred to as "the Freight Forwarder") "undertakes to perform and/or *in his own name* to procure the performance of the entire transport." *See* JA 86, cl. 2.1(a) (emphasis added). That is not the language of agency. It is an acknowledgment that the NVOCC must sub-contract some or all of the carriage obligations it has undertaken because it does not operate

vessels itself, but that sub-contracting is done by the NVOCC in its own name, i.e., as principal not as agent.

The only reference to an agency relationship in the FBL is to be found in cl. 10.2, which states that in entering into the contract evidenced by the FBL, the NVOCC (referred to as "the Freight Forwarder") contracts "as agent or trustee" for any person "whose services have been used in order to perform the contract," which would include the ocean carriers who actually carry the goods. *See* JA 94, cl. 10.2. Thus, under the FBL form, the NVOCC actually purports to contract with the cargo owner as agent for the ocean carrier, rather than contracting with the ocean carrier as agent for the cargo owner.

As the Petitioner's Brief on the Merits acknowledges, cl. 10.2 is an attempt to make performing parties such as ocean carriers party to the contract between Respondent Kirby and International Cargo Control Pty Ltd. Petitioner's Brief on the Merits, pp. 13-14. This language of agency is included in the FBL to satisfy the requirements established by the House of Lords and Privy Council in a series of cases about the validity of Himalaya clauses. *Scruttons Ltd v. Midland Silicones, Ltd.* [1962] A.C. 446 (H.L., appeal taken from Eng.); *New Zealand Shipping Co. Ltd v. A.M. Satterthwaite & Co. Ltd* [1975] A.C. 154 (P.C.); *Port Jackson Stevedoring Pty Ltd v. Salmond & Spraggon (Aust.) Pty Ltd* [1980] 2 Lloyd's Rep. 317 (P.C.). Those cases established that a Himalaya clause works to extend the protection of a contract to a third party only if: (a) the terms of the clause make it clear that the third party is intended to be protected, (b) the terms of the clause make it clear that the carrier is contracting as agent for the third party, (c) the carrier has authority from the third party to do that, and (d) that the third party provides some

form of consideration to the plaintiff. *Scruttons Ltd* [1962] A.C. at 474. The inclusion of cl. 10.2 of the FBL is clearly designed to satisfy requirement (b) for the purposes of English law. Whatever the purpose of cl. 10.2, it plainly does not amount to authorization of the NVOCC to act as agent *for the cargo owner* when dealing with sub-contractors and other performing parties.

True agency creates a fiduciary relationship. RESTATEMENT (SECOND) ON AGENCY § 13 (1958) ("An agent is a fiduciary with respect to matters within the scope of his agency"). Ordinarily, the fiduciary nature of the principal/agent relationship requires the agent to provide the principal with any information relevant to the affairs entrusted to it, and to give to the principal any profit made by the agent in connection with the transactions conducted by it on behalf of the principal. RESTATEMENT (SECOND) ON AGENCY §§ 381, 388 (1958). Thus, if an NVOCC were an agent of the cargo owner in the strict sense, it would be obliged to disclose to the cargo owner the freight rate charged to it by the ocean carrier, and to disgorge to the cargo owner any profit it made out of the transaction. That is definitely not what happens in the relationship between an NVOCC and a cargo owner. The NVOCC charges the cargo owner freight at the rate set in its own tariff, and is charged freight at the rate charged to it by the ocean carrier; it keeps the profit that lies in the difference between the two freight rates. GERALD H. ULLMAN, U.S. REGULATION OF OCEAN TRANSPORTATION UNDER THE SHIPPING ACT 1984, 121 (1995).

To hold that a cargo owner is *always* bound as a matter of law by the contracts made between an NVOCC and an ocean carrier would lead to undesirable consequences. It would mean, for example, that the cargo owner

would always be liable to the ocean carrier for the freight under the ocean carrier's bill of lading, even though it has already paid freight in full to the NVOCC. When a cargo owner pays freight to a freight forwarder but the freight forwarder does not pay the ocean carrier, the cargo owner remains liable to the ocean carrier (unless released by the carrier), with the result that the cargo owner may be forced to pay freight twice. *Bartlett-Collins Co. v. Surinam Navigation Co.*, 381 F.2d 546, 550 (10th Cir. 1967); *Strachan Shipping Co. v. Dresser Indus., Inc.*, 701 F.2d 483 (5th Cir. 1983); *National Shipping Co. of Saudi Arabia v. Omni Lines, Inc.*, 106 F.3d 1544 (11th Cir. 1997). That result, although harsh on the cargo owner, is appropriate when the cargo owner is dealing with a freight forwarder, because the cargo owner knows that it is paying freight to its agent, with instructions to pass the freight on to the carrier. The cargo owner's single freight obligation is not satisfied until the freight payment reaches the carrier's hands. In contrast, to hold the cargo owner liable to the ocean carrier would be wholly inappropriate when the cargo owner is dealing with an NVOCC, who has contracted as principal to carry the cargo owner's goods to their destination and who has charged freight itself for that task. If Question 1 is answered in the affirmative, the cargo owner will always have two freight *obligations* in respect of the same carriage of goods: one to the NVOCC and one to the ocean carrier.

III. This Court's previous decisions do not dictate an affirmative answer to Question 1.

Petitioner relies on four Supreme Court cases, which it says require an affirmative answer to Question 1. *New Jersey Steam Navigation Co. v. Merchant's Bank of Boston*,

47 U.S. (6 How.) 344 (1848); *York Co. v. Central R.R.*, 70 U.S. (3 Wall.) 107 (1865); *Great Northern Ry. Co. v. O'Connor*, 232 U.S. 508 (1914); *Chicago, Milwaukee, St. Paul & Pac. R.R. v. Acme Fast Freight, Inc.*, 336 U.S. 465 (1949). None of those cases was concerned with an intermediary that had issued its own bill of lading declaring itself to be the carrier, as International Cargo Control Pty Ltd did in the present case. In none of the cases did this Court declare as a matter of law that an entity with the same characteristics as an NVOCC is always agent for the cargo owner, no matter what the terms of the agreement between them.

In *New Jersey Steam Navigation Co. v. Merchant's Bank of Boston*, 47 U.S. (6 How.) 344 (1848), the cargo owner had "employed Harnden [the intermediary] to collect checks and drafts on the banks in the city of New York, and to bring home the proceedings in specie." 47 U.S. (6 How.) at 380. The report does not dwell on the nature of the relationship between the cargo owner and Harnden, and there is no mention in the report of Harnden issuing his own bill of lading for the carriage, declaring himself to be the carrier. This Court said of Harnden: "He had no interest in the money, or in the contract with the [ocean carrier] for its conveyance, except what was derived from the possession [of the goods] in the execution of his agency." *Id*. This Court's conclusion that the cargo owner was bound by the ocean carrier's contract thus seems to have been based on a conclusion that Harnden was the cargo owner's agent in fact, rather than on a rule that he must be regarded as an agent as a matter of law, no matter what his relationship with the cargo owner.

In *York Co. v. Central R.R.*, 70 U.S. (3 Wall.) 107 (1865), both sides accepted that the intermediary, Trout &

Son, was "but agents of the York Company," to use the words of the defendant's objection in error. 70 U.S. (3 Wall.) at 108. Trout & Son did not purport to be the carrier of the cargo owner's goods and did not itself issue a bill of lading evidencing a contract for carriage of the goods to their destination. The core of the dispute was whether Trout & Son, as agent, "was authorized to stipulate for any limitation of responsibility on the part of that company [meaning the carrier]." *Id.* at 113. This Court held that the cargo owner was bound by the contract made on its behalf by Trout & Son because "it nowhere appears that the agents disclosed their agency when contracting for the transportation of the cotton." *Id.* at 113. As in *New Jersey Steam*, the intermediary was in fact an agent; it was not found to be an agent despite having contracted as carrier.

Similarly, in *Great Northern Ry. Co. v. O'Connor*, 232 U.S. 508 (1914), the cargo owner's complaint was that the intermediary, Boyd Transfer Co., had exceeded its authority by entering into a contract with a carrier on terms that limited the carrier's liability. Although Boyd Transfer Co. did do business as a common carrier, "in addition to its regular transfer business [it] acted as a forwarder by railroad." 232 U.S. at 509. The trial judge found as fact that "the Boyd Company was the agent of the plaintiff in making the shipment, and its acts bound her." *O'Connor v. Great Northern Ry. Co.*, 136 N.W. 743, 744 (Minn. 1912), *rev'd, Great Northern Ry. Co. v. O'Connor*, 232 U.S. 508 (1914). The relationship between the cargo owner and Boyd Transfer Co. was "on terms not stated" (232 U.S. at 509), but the report does not mention any bill of lading issued by Boyd Transfer Co. or any other evidence of a carriage contract between Boyd Transfer Co. and the cargo owner. This Court was concerned with the extent of Boyd

Transfer Co.'s authority as agent in fact; it did not declare that Boyd Transfer Co. must be regarded as an agent because of some inflexible rule of law.

In *Chicago, Milwaukee, St. Paul & Pac. R.R. v. Acme Fast Freight, Inc.*, 336 U.S. 465 (1949), the question was "whether the right-over given by §20(12) [of the Carmack Amendment, then 49 U.S.C. §20(12)] to an initial carrier against its connecting carriers applies in the case of forwarders who have paid loss and damage claims to their shippers and seek recompense from the carrier responsible for the loss." 336 U.S. at 469. This Court answered that question in the negative. *Id.* at 489. Although this Court referred throughout to "forwarders" it was not considering intermediaries of a kind similar to the "ocean freight forwarder" defined in 46 U.S.C. app. §1702(17)(A) and 46 C.F.R. §515.2(o)(1). This Court said: "The forwarder has some of the characteristics of both carrier and shipper. In its relations with its customers, a forwarder is subjected by the Act to many of the requirements and regulations applicable to common carriers . . . In its relations with these carriers, however, the status of the forwarder is still that of shipper." 336 U.S. at 467-68. The Court thus appeared to be considering what would now be called an NVOCC in the context of ocean carriage, an intermediary who contracts as principal with both cargo owner and actual carrier. 46 U.S.C. app. §1702(17)(B).

The *Acme Fast Freight* Court was solely concerned with the question whether the intermediary could recover the full amount of a loss and damage claim it had paid to the cargo owner, by operation of the statutory "back to back" indemnity in the Carmack Amendment. The Court's negative answer to that question as a matter of statutory interpretation meant that the intermediary's recovery

from the carrier was limited by the terms of the contract between them, because the Forwarder's Act did not give them "relief from the requirement that they file their claims against carriers like other shippers." 336 U.S. at 487. The Court had no reason to consider the question whether an NVOCC-like intermediary must always, as a matter of law, be held to be the cargo owner's agent when contracting with the actual carrier. The Court did say that "shippers by freight forwarder have for many years been permitted to sue underlying carriers for loss or damage occasioned by the latter" (336 U.S. at 487 n.27) but that was *obiter dicta* that simply referred to the result in *New Jersey Steam Navigation Co. v. Merchant's Bank of Boston*, 47 U.S. (6 How.) 344 (1848), and *Great Northern Ry. Co. v. O'Connor*, 232 U.S. 508 (1914). That is a very thin reed upon which to build a rule that a cargo owner must *always* be bound by the contract made between an NVOCC and an ocean carrier.

This Court's own jurisprudence does not require an affirmative answer to Question 1. An affirmative answer would impose an agency relationship in all cases as a matter of law, regardless of the actual nature of the relationship between cargo owner and NVOCC, and despite the fact that the cargo owner/NVOCC relationship is usually not one of control and fiduciary obligation, the qualities that normally typify agency. There is no reason to adopt a rule that flies in the face of the facts in this way, and several good reasons not to.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 02-1028

In The

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

JAMES N. KIRBY, PTY LTD., d/b/a KIRBY ENGINEERING, and ALLIANZ AUSTRALIA LIMITED,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF *AMICUS CURIAE* OF INTERNATIONAL CARGO LOSS PREVENTION, INC. IN SUPPORT OF RESPONDENTS

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BRIEF *AMICUS CURIAE*

International Cargo Loss Prevention, Inc. ("ICLP") respectfully submits this brief as *amicus curiae* in support of the respondents. Petitioner and respondents have consented to the filing of this brief, and their attorneys' letters granting consent are filed of record.[1]

INTEREST OF *AMICUS*

Amicus is an organization committed to preventing cargo loss. Its prevention efforts include conducting claims investigations and providing mitigation services to all participants in international trade.

It is interested in the resolution of the present case because "Himalaya" clauses relieve tortfeasors of liability for cargo losses and thereby promote rather than discourage negligence.

Amicus accordingly files this brief urging this Court to affirm the Eleventh Circuit's decision on the ground that third parties who are not carriers under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. App. §§ 1300-1315 (1936), are not entitled to the benefit of COGSA's limitation-of-liability provisions, including the $500 per package limitation in COGSA § 4(5), 46 U.S.C. App. § 1304(5). COGSA carriers should not have the right to extend

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

COGSA's limitation-of-liability provisions contractually to third parties, and shippers should be entitled to fully recover their cargo damage losses from any third party tortfeasor who is not a COGSA carrier.

Amicus has a particular interest in the second question presented in the petition:

> 2. Whether federal maritime law requires that terms of a bill of lading extending liability limitations under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. §§ 1300-1315, to "independent contractors" used to perform the contract of transportation must be narrowly construed to cover only those independent contractors in privity of contract with the bill's issuer.

The unstated premise of that second question is that certain types of "Himalaya" clauses would be enforceable if confined to independent contractors in privity with the carrier issuing the bill of lading. But that premise is flawed. For numerous reasons grounded in COGSA, general maritime law, and public policy, no "Himalaya" clause should be enforceable. In other words no third-party contractor – whether or not in privity with the carrier issuing the bill of lading – should receive the benefit of COGSA's limitation-of-liability provisions.

This Court has not sanctioned a COGSA carrier's use of "Himalaya" clauses to extend COGSA limitation-of-liability provisions to non-COGSA carriers. In *Robert C. Herd & Co. v. Krawill Machinery Corp.*, this Court declined to extend COGSA limitations to a stevedore that was not a COGSA carrier where the bill of lading mentioned only the carrier as the beneficiary of the limitation provisions. 359 U.S. 297, 301-303 (1959). As noted by the

Court of Appeals below, however, courts have nonetheless read *Herd* to leave "open the possibility that a clause in a bill of lading could limit the liability of parties hired by the carrier, if drafted with sufficient clarity to specifically identify those parties." *James N. Kirby, Pty Ltd. v. Norfolk Southern Railway*, 300 F.3d 1300, 1307 (11th Cir. 2002). "Subsequent cases made that possibility a reality," the Court of Appeals notes, and "[t]oday Himalaya clauses are standard fare in bills of lading." *Id.* at 1307.

But the assumption that *Herd* "left open the possibility that a clause in a bill of lading could limit the liabilities of parties hired by the carrier," *id.*, has never been examined much less approved by this Court. Though "Himalaya" clauses have indeed become "standard fare in bills of lading," *id.*, that is not to say that they are valid or should be enforced. What is more, this Court's decision in *United States v. Atlantic Mutual Insurance Co.* supports a *per se* rule prohibiting the use of "Himalaya" clauses to relieve third parties who are not COGSA carriers of liability for their negligence, absent an immunity from liability expressly granted by Congress. 343 U.S. 236, 242 (1952).

Should this Court therefore conclude, as *amicus* urges, consistent with the Court's prior decisions, that COGSA, general maritime law, and principles of public policy prohibit the extension of COGSA limitation provisions to third parties, then the issue of contract construction presented in the second question would be moot. *No* independent contractor of a COGSA carrier – whether or not in privity with the carrier and regardless of the wording of the "Himalaya" terms in the carrier's bill of lading – would be entitled to enforce the "Himalaya" limitation

provisions in the bill of lading. *Amicus* urges this Court to affirm the decision below on that basis.

SUMMARY OF ARGUMENT

This Court should invalidate "Himalaya" clauses in bills of lading that purport to extend COGSA limitation-of-liability provisions to third parties who are not COGSA carriers. First, "Himalaya" clauses are not authorized by COGSA. In enacting COGSA Congress extended limitation-of-liability rights only to COGSA carriers. Congress did not authorize COGSA carriers themselves to extend COGSA's limitation-of-liability provisions to third parties who are not COGSA carriers, and private parties cannot "legislate" where Congress has not done so. Allowing COGSA carriers to extend COGSA limitation provisions to third parties tips the scales radically in favor of COGSA carriers and their agents and servants, greatly to the prejudice of shippers who are thereby deprived of customary tort remedies against negligent parties. Second, "Himalaya" clauses are contrary to the controlling general maritime law rule that prohibits common carriers from stipulating for the immunity of their agents and servants from liability for cargo damage. This Court has never carved out an exception to that general maritime law rule to permit a COGSA carrier to use "Himalaya" provisions to limit the liability of the carrier's agents and servants. Third, "Himalaya" clauses contravene the important public policy that tortfeasors should be liable for damages caused by their negligence.

ARGUMENT

A. Himalaya Clauses are Contrary to COGSA.

In *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 301-303 (1959), this Court noted that nothing in the provisions, legislative history and environment of COGSA evidences any Congressional intent to limit the liability of negligent agents of a carrier. "It must be assumed," this Court observed, "that Congress knew that generally agents are liable for all damages caused by their negligence." *Id.* at 302. "'We can only conclude,' the Court added, 'that if Congress had intended to make such an inroad on the rights of claimants [against negligent agents], it would have said so in unambiguous terms' and 'in the absence of a clear Congressional policy to that end, we cannot go so far.'" *Id.* (quoting *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 581 (1943)). It follows that not only does COGSA not authorize "Himalaya" clauses, but the enactment of COGSA evinces Congressional intent not to extend COGSA limitation provisions to third parties who are not COGSA carriers.

When Congress afforded COGSA immunities and liabilities to COGSA carriers, it did so pursuant to a carefully constructed legislative scheme that struck a fair balance between the rights and obligations of shippers, on the one hand, and *carriers* on the other hand. "Himalaya" clauses upset that legislative balance by extending COGSA benefits to third parties not intended by Congress to have such benefits, thereby needlessly and unfairly depriving shippers of customary tort remedies against negligent parties causing cargo damage.

While *Herd* notes that the limitation-of-liability provisions in the bill of lading contract in that case also

did not indicate any intention on the part of the contracting parties to limit the liability of negligent agents of the carrier, 359 U.S. at 302-303, this Court did not suggest, much less hold, that bill of lading provisions *could* validly limit the liability of negligent agents of the carrier. The numerous "Himalaya" clauses in bills of lading that have emerged in the wake of *Herd* are therefore neither authorized by COGSA nor, strictly speaking, foreshadowed by this Court's decision in *Herd*.

"Himalaya" clauses relieving third parties of liability for negligence are also contrary to section 3(8) of COGSA, 46 U.S.C. App. § 1303(8), which provides that:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.

While COGSA § 3(8) literally addresses only the liability of the carrier and the ship, the plain thrust of that section is to prohibit bill of lading provisions that lessen the liability provisions of COGSA viewed as a whole. *See, generally, Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534-539 (1995). Because a COGSA carrier cannot by virtue of section 3(8) lessen its liability to a shipper otherwise than as provided in COGSA, it follows that a COGSA carrier cannot limit the liability of its agents and servants in a manner not authorized by COGSA. *See Herd*, 359 U.S. at 302 ("Yet Congress, while limiting the liability of 'the carrier [and] the ship,' did not even refer to stevedores or agents of a carrier."); *see also* Harter Act § 1, 46

U.S.C. App. § 190 (prohibiting carrier from making provision in a bill of lading that seeks to absolve owner or operator of vessel for negligence).

Furthermore, this Court in *Herd* ruled that agents of the carrier performing bill of lading services for the carrier are not as a matter of law entitled to limit their liability to the same extent as the carrier, specifically observing that "[f]rom its early history this Court has consistently held that an agent is liable for all damages caused by his negligence, unless exonerated therefrom, in whole or in part, by a statute or a *valid* contract binding on the person damaged." 359 U.S. at 770 (emphasis added). Himalaya provisions purporting to immunize agents or servants of the carrier in whole or in part from liability resulting from their negligence are not "valid" in the light of COGSA.

B. Himalaya Clauses are Contrary to The General Maritime Law.

In *Atlantic Mutual*, this Court observed that "[t]here is a general rule of law that common carriers cannot stipulate for immunity from their own or their agents' negligence." 343 U.S. at 239. "While this general rule was fashioned by the courts," this Court added, "it has been continuously accepted as a guide to common carrier relationships for more than a century and has acquired the force and precision of a legislative enactment." *Id.*

In invalidating the "Both-to-Blame" clause in a carrier's bill of lading, this Court in *Atlantic Mutual* enforced "the controlling rule that without congressional authority [carriers] cannot stipulate against their own negligence or that of their agents or servants." *Id.* at 242. Himalaya provisions are "stipulat[ions] for immunity," *id.*

at 239, entirely lacking in "congressional authority," *id.* at 242, and therefore contravene the general maritime law rule prohibiting carriers from relieving their agents of liability for their negligence.

Herd does not qualify or limit the controlling general maritime law rule recognized and applied in *Atlantic Mutual*. In *Herd*, this Court noted that "contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries, for they 'are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties.'" 359 U.S. at 305 (quoting *Boston Metals Co. v. Winding Gulf*, 349 U.S. 122, 123-125 (1955) (Frankfurter, J. concurring)). It is on the basis of that *dictum* that "Himalaya" clauses have become "standard fare in bills of lading." *Kirby*, 300 F.3d at 1307.

But that *dictum* is not – as the resulting "Himalaya" clause jurisprudence suggests – *de facto* authorization for carriers to "stipulate for immunity from their own or their agents' negligence," *Atlantic Mutual*, 343 U.S. at 239. The "Himalaya" clause jurisprudence that has developed following *Herd* rests on the faulty premise that this Court sanctioned the contractual extension of COGSA limitation provisions to non-COGSA carriers, when in fact this Court never did so.

In referring in *Herd* to the rule of strict contract construction, this Court was simply noting why the majority ruling in the *Collins* case was contrary to common law rules of strict contract construction. *See Herd*, 359 U.S. at 305. This Court, *amicus* respectfully suggests, was *not*

carving out an exception to the general maritime law rule recognized and applied in *Atlantic Mutual* prohibiting common carriers from stipulating against the liability of their agents unless authorized by Congress to do so. To the extent that the passage from *Herd* concerning strict contract construction suggests any departure from *Atlantic Mutual*, this Court should step in, reaffirm the continuing vitality of the prohibitory *Atlantic Mutual* general maritime law rule, and invalidate "Himalaya" clauses altogether.

Though viewing *Herd* to authorize the extension of contractual limitation-of-liability clauses to non-carriers, the Courts of Appeals have nonetheless noted the public policy reasons why contractual clauses should not be enforced. Thus, for example, in *Grace Line, Inc. v. Todd Shipyards Corp.*, the Court of Appeals ruled that "*Herd* stands for the proposition that clear and express language in the contract is the *sine qua non* for altering the common law; but when that requirement is met, it is still open for the courts to decide whether a particular alteration is contrary to public policy." 500 F.2d 361, 373 (9th Cir. 1974). "*Herd* did *not* imply," the Court of Appeals added, "that a contract, if clear and express in its intent, would be adequate to alter any familiar rule of tort liability whatsoever." *Id.* (emphasis in original). Applying that rule, *Grace Line* invalidated a contract clause purporting to wholly immunize a non-COGSA carrier from liability, in the process distinguishing a "Himalaya" clause that limited a stevedore's liability to the COGSA $500 per package. *Id.* (citing *Tessler Bros. (B.C.) Ltd. v. Italpacific Line*, 494 F.2d 438, 443 (9th Cir. 1974)).

But the *Grace Line* distinction between a COGSA immunity from liability and a COGSA limitation of liability is unfounded. The COGSA $500 package limitation is not valid simply because it is a limitation of, as opposed to a blanket immunity from, liability. *Grace Line*, 500 F.2d at 373. The dispositive point is that *Herd*, in the light of *Atlantic Mutual*, does not sanction the application of COGSA's $500 package limitation-of-liability provisions to non-COGSA carriers. *Herd* does not silently roll back the rule of *Atlantic Mutual* prohibiting carriers from stipulating against the negligence of their agents and servants or render *Atlantic Mutual* "inapposite" to the validity of a "Himalaya" clause. *See Tessler Bros.*, 494 F.2d at 443. "Himalaya" clauses in short simply cannot be squared with the general maritime law rule that negligent parties *should* be responsible for the consequences of their negligence, absent a statutory immunity from liability. And it is "still open for the courts to decide whether a particular alteration" of the common law, in the words of the Ninth Circuit, "is contrary to public policy." *Grace Line*, 500 F.2d at 373.[2]

C. Himalaya Clauses are Contrary to Public Policy.

Himalaya clauses purporting to extend COGSA package limitations to negligent non-COGSA carriers

[2] That limitation clauses are nonetheless frequently *de facto* exoneration clauses is evident here where the railroad seeks to limit its liability to $5,000 – less than one third of one per cent of the total damages of $1.5 million. That disparity is so massive as to make the Himalaya clause in this case a virtual exoneration clause, rather than simply a limitation-of-liability provision.

must be viewed in the light of the paramount public policy that tortfeasors must be responsible for their actions. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 441-42 (1889). "[T]he doctrine that an express stipulation by any common carrier for hire, in a contract of carriage, that he shall be exempt from liability for losses caused by the negligence of himself or his servants, is unreasonable and contrary to public policy, and consequently void." *Id.* The rule prohibiting stipulations against negligence is so entrenched that it has "acquired the force and precision of a legislative enactment." *Atlantic Mutual*, 343 U.S. at 239; *see also Brady*, 317 U.S. at 580 ("The liability of an agent for his own negligence has long been embedded in the law."). "Himalaya" clauses should therefore be *per se* unenforceable, at least until such time as Congress shall have expressly authorized them.

A *per se* rule prohibiting the extension of COGSA package limitations to non-carriers – mandated by *Atlantic Mutual* and not foreclosed by *Herd* – promotes the sound and long-standing public policy demanding that negligent parties bear full responsibility for the consequences of their actions. Himalaya clauses perversely promote negligence. They relieve negligent parties of responsibility for their conduct, thereby encouraging tortfeasors to disregard appropriate standards of care.

CONCLUSION

The decision of the Eleventh Circuit should be affirmed on the ground that "Himalaya" clauses purporting to extend COGSA limitation-of-liability provisions to third parties who are not COGSA carriers are invalid.

Respectfully submitted,

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No. 02-1028

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY, PTY LTD., DBA KIRBY ENGINEERING, AND ALLIANZ AUSTRALIA, LIMITED
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS IN SUPPORT OF PETITIONER

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March 24, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether a foreign cargo owner who shipped goods to an inland destination in the United States and who uses a shipping intermediary is bound by the liability limitations (the Himalaya Clause) in the intermediary's bill of lading, or those in the bill of lading that an ocean carrier issued to the intermediary, when suing a railroad that subcontracted with the ocean carrier to deliver the goods to their destination.

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On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* [1]

National Association of Waterfront Employers (NAWE) member companies perform stevedoring and/or marine terminal services at most ports in the United States and in some ports in foreign countries. One NAWE member,

[1] In accordance with this Court's Rule 37.6, counsel of record states that he is the sole author of this brief, that no entity other than the named *amicus* party has made a monetary contribution to the preparation of this brief, and that NAWE member, Lambert's Point Docks, has made no contribution other than its annual dues assessment to *amicus*. Pursuant to Rule 37.2(a) blanket letters of consent have been filed with the Clerk.

Lambert's Point Docks in Hampton Roads, Virginia is owned by Petitioner. It and other NAWE member companies are those companies which load and unload cargo on and off vessels calling at ports in the United States, including Puerto Rico, and some foreign countries, and as such have a very real interest in ocean carrier bills of lading pursuant to the Carriage of Goods by Sea Act ("COGSA") and the precise language of the Himalaya Clause in those bills. NAWE members are quite concerned about whether their responsibilities and liabilities are to be governed by a bill of lading issued by their customer ocean carrier, or by a 'bill of lading' issued by a stranger transportation intermediary of whom they have no knowledge. The answer to that question will dictate what NAWE members must do in the future to understand their rights and sponsibilities with respect to cargo they handle as well as what others, such as Petitioner, must do.

This case involves the shipment of ten containers of machinery from a point in Australia destined for Huntsville, Alabama via the ports of Sydney, Australia and Savannah, Georgia. It is common knowledge that such a shipment required the services of (1) a transport entity in Australia to deliver the containers to (2) a marine terminal in Sydney, Australia where the containers were loaded by (3) a stevedore entity onto a (4) vessel, here operated by Hamburg Sud (Columbus Line), an (5) American stevedore to unload the containers when the vessel arrived at the (6) marine terminal in Savannah under instructions of Hamburg Sud (Columbus Line) delivered by the terminal operator to (7) Petitioner, Norfolk Southern Railway Company for transportation to Huntsville, Alabama. Unfortunately, the train was derailed en route to Huntsville and the machinery damaged. The shipper was paid by its insurer for the loss and an action was brought to recover from Norfolk Southern the amount paid by the insurer to the shipper.

Although the present action is between a shipper and its insurer and the actual ocean carrier's designated inland carrier, this Court's decision could affect all parties providing actual transportation services pursuant to the ocean carrier's bill of lading, including the stevedore and marine terminal operator members of NAWE, who perform the stevedoring and marine terminal services enumerated as (5) and (6) above in the case of imported goods and (2) and (3) in the case of exports. This Court's decision as to which bill of lading governs, that of the carrier which actually performs the transportation or that of a transportation intermediary which performs no actual transportation, will dictate what NAWE members and others in the actual transportation chain must do in the future to understand and protect their rights and responsibilities with respect to the cargo they handle.

SUMMARY OF ARGUMENT

The decision of the court below, *James N. Kirby, Pty Ltd., d/b/a Kirby Engineering and Mmi General Insurance Limited v. Norfolk Southern Railway Company*, 300 F.3d 1300 (11th Cir. 2002) holding that the shipping intermediary's bill of lading controlled the liability of the ocean carrier because there was no "privity" between the ocean carrier and the shipper, and therefore the U.S. inland carrier, with the owner of the goods shipped *(Kirby* at 1305, 1307 and 1309) is wrong.

There was the necessary "privity" between Kirby, the shipper, and the ocean carrier because, at all times, with respect to the actual ocean carrier, the intermediary, whatever denominated, be it broker, forwarder, or non-vessel operating-common carrier (NVOCC), was the agent of the shipper with respect to the actual carrier, and the ocean carrier's bill of lading issued to the agent was binding on its principal, the shipper.

ARGUMENT

I. DUELING BILLS OF LADING

There were two bills of lading issued. The first was issued by International Cargo Control Pty Ltd. (ICC) to the shipper of the machinery, James N. Kirby, Pty Ltd., d/b/a Kirby Engineering (Kirby) who had sold the machinery to General Motors for delivery at Huntsville, Alabama. That bill of lading was issued 'to formalize the contract of carriage' entered into by Kirby with ICC to fulfill Kirby's 'obligation to deliver the machinery to Huntsville.' (*Kirby* at 1302). The second bill of lading was issued by Hamburg Sud to ICC for the actual movement of the machinery from Sydney to Huntsville via the port of Savannah and named ICC as shipper. The Hamburg Sud bill contained its own Clause Paramount, and its own Himalaya Clause that extended the bill's limitations on Hamburg Sud's liability to 'all agents, servants, employees, representatives, all participating (including inland) carriers and all stevedores, terminal operators, warehousemen, crane operators, watchmen, carpenters, ship cleaners, surveyors and independent contractors whatsoever.' (*Kirby* at 1303).

In essence, the Hamburg Sud bill of lading extended Hamburg Sud's Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300-1315, limitation of liability to each and everyone, the actual participants in the transport of Kirby's containers. However, the court below held that because there was no "privity" between Hamburg Sud and Kirby, the Hamburg Sud bill of lading did not protect Norfolk Southern. In effect, by the court's reasoning, none of Hamburg Sud's contractors would have been protected. However, the court also stated had there had been the necessary "privity," then the clearly stated Hamburg Sud bill of lading would include Norfolk Southern.

> "This is not to say that a Himalaya Clause can never readily identify a well-defined class of persons that in-

> cludes inland carriers like Norfolk Southern. However, if the Himalaya clause is to extend inland, it must say so with specificity, as, for example did the Himalaya clause in the Hamburg Sud bill when it clearly identified as among its beneficiaries "all participating carriers (including inland) carriers. (emphasis added)" (*Kirby* at 1311).

However, since the court found there to be no "privity" between the shipper and the actual [ocean] carrier, it determined that the actual carrier's bill of lading did not apply. Thus, it found that intermediary's bill of lading was controlling and that its limitation of liability provision was too indefinite and broad to include Norfolk Southern.

II. WHICH HIMALAYA CLAUSE APPLIES

The legality of the Himalaya Clause is not an issue in this case, *Robert C. Herd & Co. Inc. v. Krawill Mach. Corp.*, 359 U.S. 297, 79 S.Ct. 766, 3 L.Ed. 2d 820 (1958). Neither is this Court's requirement that contracts purporting to grant limitation of liability must be strictly construed and limited to their intended beneficiaries. The issue here is which bill of lading applies: that of a transportation intermediary or that of the ocean carrier actually providing the transportation. *Amicus* submits that it must be the latter. If not, then any shipper in combination with a transportation intermediary holding itself out as a carrier could—by a defective bill of lading—knowingly or unknowingly defeat the entire international shipping regime's liability provisions as set forth in COGSA. It simply makes no sense to hold that a shipping document issued by a non-vessel operating transportation intermediary takes legal precedence over an ocean bill of lading issued by an ocean common carrier which actually performs the contracted transportation. The fact that the intermediary appears as the "shipper" on the actual carrier's bill of

lading does not mean that the true owner of the goods shipped on whose behalf the intermediary was acting is not bound by the actual carrier's bill of lading.

III. WHO OR WHAT IS ICC?

A key issue in this case is who, or what, was ICC, identified by the court below as "an Australian freight forwarder." (*Kirby* at 1302). However, the trial judge described ICC as "an Australian cargo broker. ICC does not transport cargo, but rather arranges for cargo transportation by carriers." (Petitioner's Appendix C at 28a.). Unfortunately, the record below is silent as to what an Australian freight forwarder or cargo broker is, or can do, under Australian law. ICC's legal identity is important, because the court below indicates that the outcome of this case depends upon the relationship between ICC and the actual owner of the cargo shipped, Kirby (*Kirby* at 1305), and that if ICC was acting as an agent for Kirby when the shipping contract with the actual ocean carrier, Hamburg Sud, was made, its decision would have been in favor of Petitioner, Norfolk Southern. (*Kirby* at 1311).

Under applicable U.S. law in effect in 1997, namely the Shipping Act of 1984, 46 U.S.C. § 1701 *et seq.*, ICC was not an "ocean freight forwarder" as defined in § 3(19) of the Shipping Act (46 U.S.C. app. 1703(19)). That section requires that the shipments dispatched by the ocean freight forwarder be "from the United States." An ocean freight forwarder dispatches shipments via common carriers or otherwise arranges space for those shipments "on behalf of shippers." As the court below pointed out at page 1307, ICC clearly did not meet that requirement. COGSA has no definition of freight forwarder. While ICC did not actually transport the cargo, it nevertheless

issued to Kirby a bill of lading and assumed responsibility for the shipment to Huntsville. (*Kirby* at 1302). Under

applicable U.S. law, the Shipping Act of 1984, that would make ICC a "non-vessel-owning-common carrier," (or an "NVOCC"), which is defined as "a common carrier that does not operate vessels by which the ocean transportation is provided, *and is a shipper in its relationship with a common carrier*." (46 U.S.C. app. 1703(17)). (emphasis supplied)[2]

As a "common carrier," in order to function lawfully in the trade from Australia to the United States ICC would have had to file a complete "tariff" with the Federal Maritime Commission showing "all its rates, charges, classifications, rules and practices between all points or ports on its own route and on any through transportation route that has been established" and include sample copy of "any bill of lading, contract of affreightment, or other document evidencing the transportation agreement." (46 U.S.C. 1707(a)).

The record is silent as to ICC meeting its tariff filing obligations as an NVOCC under the Shipping Act. What is clear is that however described, ICC did not undertake to actually provide any of the ocean transportation it contracted for with Kirby and that Kirby knew it. As the dissenting judge below succinctly stated at *Kirby* page 1312:

> "There is nothing in the record which indicated that Kirby expected ICC to ship the goods other than by contracting it with another carrier. . . . When the bill of

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[2] Comments of the Senate Committee on Commerce, Science and Transportation on Senate bill, S. 504, a predecessor to Senate bill, S. 47 which became Pub. L. 98-237, the Shipping Act of 1984, about "non-vessel-operating common carrier" should be noted. The Committee report states at page 20; "(17) 'Non-vessel-operating common carrier' gives statutory recognition to this marine operator who acts as a consolidator and intermediary between vessel operators and shippers of less-than—container loads. The shipper status of an NVO, in its relationship with the vessel operator, is intended to afford the NVOs the same protection against unjust discrimination." Senate Report No. 98-3, 98th Congress, 1st Session.

lading between Kirby and ICC was issued, Kirby knew that an inland carrier would have to be used, because of the destination being Huntsville, Alabama."

The dissent concludes that "Kirby knew from the start that the ultimate destination would have to be through an inland carrier, so it should not be able to prevail on the technicality of its lack of "privity" of contract." The plain fact is that ICC was acting as Kirby's agent and that Kirby (and its insurer) were bound by contracts entered into by ICC on Kirby's behalf.

IV. WITH RESPECT TO THE ACTUAL CARRIERS, ICC ACTED AS AN AGENT FOR THE SHIPPER

Who or what was, or is ICC, and what effect did its alleged bill of lading have on the actual participants in the through movement of goods in international waterborne commerce? Was the bill of lading it issued to Kirby any more than a contract between the shipper/owner of the goods and a transportation intermediary under which the latter undertakes to perform certain services on behalf of the shipper/owner, and thus is binding only those two parties? Obviously, ICC did not undertake to actually transport any machinery to Huntsville. It only agreed to make the necessary arrangements. Thus, ICC, with respect to Hamburg Sud and its subcontractors, was not acting as a common carrier, and the fact that it issued a document entitled "bill of lading" is in itself not determinative. *Chicago, Milwaukee, St. Paul & Pacific R.R. Co. v. Acme Fast Freight*, 336 U.S. 465, 484, 93 L.Ed. 817, 69 S.Ct. 692 (1949). Simply arranging for transportation and not actually effecting it does not make a carrier. *Aquascutum of London, Inc. v. S.S. American Champion*, 426 F.2d 205, 210 (2nd Cir. 1970) and *Hoffman-Laroche v. M/V TFL Jefferson et al.*, 731 F.Supp 109, 111 (S.D.N.Y. 1990).

Amicus submits that a bill of lading issued by a transportation intermediary, such as an "Australian freight forwarder" or "cargo broker," or even an NVOCC, to its shipper principal (disclosed or not) can not trump the contractual relationship between the actual common carrier and the parties enumerated in that carrier's bill of lading for the transportation actually performed thereunder.

As one court has stated,

> "Thus for the purposes of the Shipping Act . . . the NVOCC is a hybrid; it is a common carrier with respect to the shippers who use its services: as such it files a rate tariff with the Federal Maritime Commission and is subject to all laws governing common carriers. With respect to the vessel and her owner, NVOCC is an agent of the shipper, and thus merely a customer. . . . indeed, only one customer among hundreds on any given voyage."
>
> "While the NVOCC is considered an agent of its shipper in relation to the vessel and her owner, the nature and scope of said agency is limited to the transportation services contract by the NVOCC on the shipper's behalf. The NVOCC is itself liable to the shipper by virtue of its own bill of lading, the tariff and the law applicable to the particular trade in which the NVOCC is involved." *Modern Office System, Inc. v. Aim Caribbean Express, Inc.* (DC, PR 1992), 802 F. Supp. 617, 622), *citing Ins. Co. of North America v. S.S. American Argosy*, 732 F.2d 299, 301 (2nd Cir. 1984), *and M. Prusman Ltd. v. M/V Nathanel*, 670 F.Supp.1141 (S.D.N.Y. 1987).

The court below at *Kirby* pages1304-5 found that the ocean carrier's (Hamburg Sud) bill of lading and Himalaya Clause could limit Norfolk Southern's liability to Kirby, (the cargo owner) if Kirby is bound by the terms of that bill. If ICC had been acting as Kirby's agent when it entered into the shipping contract with Hamburg Sud, then ICC had authority to—and did—bind Kirby to the terms of the Hamburg Sud bill,

including its package limitation and Himalaya Clause. Thus the required "privity" between the shipper, Kirby, and the inland carrier, Norfolk Southern, would be satisfied.

Actually, the required "privity" is only some contractual relationship between a party claiming protection of a Himalaya Clause on the one who issued the clause. Thus, in *Mikinberg v. Baltic Steamship Co., Rice Unruh, Reynolds Company, and UTS, a Division of Universal Maritime Services*, 988 F.2d 327 (2nd Cir. 1993) the Second Circuit denied Himalaya Clause protection (limitations of liability) to Universal because Universal showed no "contractual relationship" with the ocean carrier, Baltic. The court said at 332:

> "There must be a contractual relationship between Universal and Baltic in order for the provisions of the 'Himalaya Clause to apply. Otherwise, any transporter in the flow of commerce would be automatically protected by a single bill of lading regardless of its privity of contract with the shipper or carrier. We decline to extend COGSA protections through the 'Himalaya clause to indefinite and unforeseeable defendants who have only an attenuated connection to the 'carriage of goods by sea."

The case was then remanded to the district court to allow Universal to establish what its relationship to Baltic was. However, in the case at bar, Norfolk Southern was not an unforeseeable defendant under either of the bills of lading. Both the ICC bill of lading and Hamburg Sud bill called for inland transportation in the United States, and all parties knew that such transportation was significantly more than an "attenuated connection." Neither contract could have been fulfilled without inland rail service.

V. THE ACTUAL CARRIER'S BILL OF LADING BINDS ALL PARTIES

Both the district court and the dissenting judge below, *Kirby* at 1312, determined that ICC was acting as Kirby's agent and that ICC was not going to ship the goods other than by contracting it with another carrier. Kirby accepted a limitation of liability and Himalaya Clause in the written contract with ICC. As the dissent below points out at page 1312 ". . . that would include a limitation for Hamburg Sud." The dissent also states that it should also include the Norfolk Southern. More importantly, the dissent below agrees with *amicus* that ". . . . Kirby was bound by the Hamburg-Sud bill of lading . . .'.

Amicus submits that the rule in cases such as this should be that which the United States, as *amicus curiae*, discusses at page 18 of its brief filed in this proceeding:

> "This Court's decision in *Great Northern Railway, Co. v. O'Connor*, 232 U.S. 508 (1914) suggests, that when a carrier accepts goods for transport from an intermediary, the liability limitations in the carrier's terms of carriage are enforceable against the cargo owner regardless of whether the intermediary contracted with the carrier "as agent [of the cargo owner] or Forwarder.' *Id.* at 514."

In that case this Court stated at 515 that, "if the Forwarder was shipper for the purpose of securing carload rates, it was also shipper for the purpose of classifying and valuing, in order to determine which tariff was applicable. . . . "the carrier has the right to assume that the [Forwarder] could agree upon the terms of the shipment, some of which were embodied in the tariff. The carrier is not bound by [the shipper]'s private instructions or limitation on the authority of the [Forwarder], whether it be treated as agent or Forwarder." And at 516 the Court concluded that:

> ". . . The carrier, in the absence of something showing rebating, or false billing, is entitled to collect the rate

which applies to goods of that class, and if sued for their loss is liable only for the loss of what the shipper had declared them to be in class and value."

The net result is that the shipper is bound by the terms of the contract (bill of lading) entered into for the shipment of its goods between an actual carrier and transportation intermediary engaged by the shipper including the lower ocean freight rate and the limitation of liability provisions in the ocean carrier's bill of lading.

Finally, in *Nippon Fire & Marine Insurance Co, Ltd., v. Skyway Freight Systems, Inc., American International Airways, Inc. and United Airlines, Inc.*, 235 F.3d 53 (2nd Cir. 2000), the Second Circuit held at page 61 that as between an intermediary's bill of lading and the actual (secondary) carrier's bill of lading, the latter governs the rights of the shipper and the actual carrier. In that case the secondary carrier's bills of lading restricted the nature of a claim the shipper and its intermediary could bring against them for loss or damage–breach of contract, and not tort or bailment. The court found that limitation of liability binding on the shipper and its insurer. Since the shipper/insurer did not state a claim for breach of contract, the claim against the actual (secondary) carriers was dismissed.

CONCLUSION

The court below applied the wrong bill of lading and its limitation of liability provisions. It should have applied the bill of lading issued by Hamburg Sud, not that issued by ICC, and by the court's own reasoning the decision of the district court should have been affirmed. This Court can and should put the issue to rest and avoid future litigation concerning who is what, and what rights does it have in intermodal international transportation. It can do so by finding a transportation intermediary's contract or bill of lading with its shipper client is not binding on the carrier actually performing the transportation. The governing contract or bill of lading setting forth the rights of the shipper *vis-à-vis* those who actually perform the transportation functions is the one issued by the actual carrier to the transportation intermediary.

If the decision below is left to stand, ocean carriers involved in through intermodal transportation such as that in the instant case will have to take steps to protect themselves and their subcontractors from the effect of deficient intermediary bills of lading. One such step could be to require all intermediaries to name themselves and their principal as shippers on the ocean carrier's bill of lading. Another possibility could be to require all intermediaries to state in the bill of lading they issue to the shipper that the terms of the actual carrier's bill of lading are included by reference in the intermediary's bill of lading. Another possibility could be for an ocean carrier to publish in the tariff it is required by § 8 of the Shipping Act, 46 U.S.C. app. § 1707 (2002) to "keep open to public inspection in an automated tariff system" its rates, rules, bills of lading, etc., a rule providing that its bill of lading takes precedence over any intermediary's bill of lading for goods carried by the ocean carrier.

All of those possible actions and others not prohibited by § 10 of the Shipping Act 46 U.S.C. app. § 1709 (2002), complicated cross indemnification agreements and other legal devices would be unnecessary if the decision below is reversed and a determination that the bill of lading issued by the actual carrier to a transportation intermediary holding itself out as a carrier—by whatever name—determines the rights and liabilities of the shipper.

Therefore, the decision below should be reversed by this Court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY, PTY LTD. d/b/a KIRBY ENGINEERING, AND ALLIANZ AUSTRALIA LIMITED,
Respondents.

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On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE, THE EUROPEAN SHIPPERS' COUNCIL, AND THE AUSTRALIAN PEAK SHIPPERS ASSOCIATION, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE, THE EUROPEAN SHIPPERS' COUNCIL, AND THE AUSTRALIAN PEAK SHIPPERS ASSOCIATION, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS[1]

INTEREST OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

Founded in 1907, the National Industrial Transportation League ("NITL" or "League") is one of the oldest and largest

[1] Pursuant to Rule 37.6 of this Court, NITL, ESC, and APSA certify that this brief was authorized only by their counsel identified on the cover page hereof and no other person or party authored this brief in whole or in part. Furthermore, no person or entity other than the *amici* identified herein, or their members, has made a monetary contribution with respect to the preparation or submission of this brief.

national associations in the United States. It represents more than 600 companies engaged in the transportation of goods in domestic and international commerce. For many years, NITL's membership was open only to shippers and receivers of goods. However, the League recently broadened its membership to permit carriers and all other persons engaged and interested in the transportation of goods to become members. NITL's membership now includes not only shippers and receivers of goods, but also carriers, transportation intermediaries, logistics companies, and similar entities. The majority of League members, however, continue to be traditional shippers and receivers. The League's shipper members use all of the modes of carriage—motor, rail, vessel, and air—to ship commodities of all kinds across the nation and around the world.

Since its founding, NITL has supported government policies that promote competitive, efficient, and safe transportation systems both in the United States and around the world. Toward that end, the League has participated actively in federal regulatory proceedings and legislative matters dealing with national and international transportation, as well as before international organizations concerned with transportation, such as the Maritime Transportation Committee of the Organization for Economic Cooperation and Development, the Comité Maritime International, and the International Chamber of Commerce. In addition, the League was involved in passage of the key statutes referred to by the parties in this case, including the Carriage of Goods by Sea Act, Ch. 229, 49 Stat 1207 (1936) ("COGSA"), codified at 46 U.S.C. App. § 1300 *et seq*., and the Shipping Act of 1984, P.L. 98-237, 98 Stat. 67, and the amendments to that law adopted in the Ocean Shipping Reform Act of 1998, P.L. 105–258, 112 Stat. 1902, 46 U.S.C. App. §§ 1701–1719 (hereafter the "Shipping Act").

INTEREST OF THE EUROPEAN SHIPPERS' COUNCIL

Founded in 1963, the European Shippers' Council ("ESC") represents the interests of companies trading in Europe as users of freight transport services. Members are drawn from 11 national transport user organizations and national shippers' councils. The organization represents the vast majority of goods distributed by sea, road, rail, inland waterways, and air. ESC acts as the "eyes and ears" for its member organizations in respect of EU legislative activity. Equally, it functions as the "voice" of shippers in Brussels. It has the dual role of gathering and feeding back vital intelligence on current and future EU policy developments and representing its positions vis-à-vis the European institutions (European Commission, Parliament and Council).

Since its founding, ESC's prime objective has been to promote efficient and competitive freight transport services to enhance the competitiveness of companies conducting business in and beyond Europe. In this respect, ESC has two core purposes: first, to encourage and persuade transport policy makers to develop open and competitive transport markets that enhance industrial competitiveness and efficiency; and second, to promote industry best practices to encourage efficiency and improvements in transport supply chains. In addition, ESC has, over the years, been involved in discussions on the need to develop a new international maritime cargo liability treaty reflecting modern shipping practices and standards, and ESC has supported the work of UNCITRAL. ESC's participation in this case is limited only to the precise questions before the Court and does not indicate ESC's support of a cargo liability regime that allows for the application of maritime liability limits to inland carriers by contract or otherwise.

INTEREST OF THE AUSTRALIAN PEAK SHIPPERS ASSOCIATION, INC.

The Australian Peak Shippers Association, Inc. ("APSA") was founded in 1990 after the demise of its predecessor, the Australian Shippers Council. APSA is the Designated Peak Shipper Body declared by the Federal Minister of Transport under Part X of the Australian Trade Practices Act. The organization represents the interests of Australian exporters generally, dealing with international liner cargo shipping services in matters such as frequency of shipping services; terms and conditions of bills of lading; ocean freight rates and surcharges; and cargo liability legislation. One of APSA's primary purposes is to consolidate and communicate to liner shipping operators, other industry groups, port authorities, and governments its members' views on all matters concerning the shipment of liner commodities. Also, it serves as a point of contact for consultation and negotiation with liner shipping operators, other industry groups, port authorities, and governments, and ensures that the needs of, and constraints on, Australia's liner trades are considered in the formulation of government policy.

STATEMENT

A substantial volume of international cargo moving across the oceans is tendered by shippers to ocean transportation intermediaries known in the United States as non-vessel-operating common carriers ("NVOCCs").[2] An NVOCC does not own or operate the assets used to move cargo; rather, it makes arrangements with an ocean carrier to physically transport the goods. If the service required is for "through" transportation, involving an inland origin and/or an inland

[2] The Federal Maritime Commission has estimated that NVOCCs are involved in 25% of all containerized cargo entering or exiting the United States by ocean carrier. Federal Maritime Commission, THE IMPACT OF THE OCEAN SHIPPING REFORM ACT OF 1998, at 84 (2001).

destination, then the ocean carrier hired by the NVOCC usually engages the inland carriers (i.e., railroad or truck) to perform the necessary inland components.

This case concerns the transportation of a through international shipment that was arranged for a shipper (Kirby) by an entity that appears to have been an NVOCC (ICC). The shipment was transported from Australia to Alabama. The NVOCC hired an ocean carrier (Hamburg Sud) to perform the transportation service. Two separate bills of lading (or contracts of carriage) were issued with respect to the shipment: The NVOCC issued a bill of lading to the shipper, and the ocean carrier issued a bill of lading to the NVOCC. The ocean carrier hired an inland carrier, Norfolk Southern, to deliver the goods to the final destination. The shipment was extensively damaged as a result of the railroad's negligence. When the shipper sought to recover its loss from the railroad, the railroad claimed, among other defenses, that the applicable contracts involved with the shipment both included "Himalaya clauses" that entitled it to benefit from the ocean carrier's and the NVOCC's liability limits.[3]

One of the questions that this Court has been asked to resolve is whether ICC operated as the agent of Kirby when it hired Hamburg Sud. If ICC is Kirby's agent, then Kirby would become bound by the terms in the ocean carrier's bill of lading. However, as explained further below, under industry practices, the shipper is not a party to the NVOCC/ocean carrier contract, has no dealings with the ocean carrier, and often does not even know the identity of the ocean carrier or any subcontractors that may be hired by that carrier. The Eleventh Circuit decided properly that the status and func-

[3] By including a Himalaya clause in the carrier's bill of lading, the COGSA limitation of liability can be extended to agents of the carrier and to other entities. Saul Sorkin, GOODS IN TRANSIT § 14.15 (2004).

tions of ICC and the relationship between ICC and Kirby were utterly inconsistent with that of an agency. Thus, the Himalaya clause in Hamburg Sud's bill of lading could not be enforced against Kirby. Of course, Kirby is (and should be) bound by ICC's bill of lading, which is the *only* contract in which it directly participated.

This Court should uphold the Eleventh Circuit's ruling on the agency issue, not only because such a result is contrary to the facts of the case, but also because of the uncertain and harmful consequences that would occur if shippers were forced into contractual privity with unknown parties under unknown terms. The creation of a new agency rule in the context of this case, which could have broad application to dealings between *all* NVOCCs and shippers in the future, would adversely affect a shipper's right to recover cargo losses from negligent parties. It would also unnecessarily expose the shipper to potential liability and other claims (e.g. for freight) that could be asserted by the ocean carrier based on the terms in its bill of lading that were never accepted by the shipper.

The other question before the Court over the meaning of the Himalaya clause in ICC's bill of lading is largely a matter of contract interpretation. As that question does not have the same long-term implications for the industry as the agency question, the amici herein do not address that issue in detail in this brief. However, the organizations herein strongly support the analysis of the respondents and their other supporting amici as to the meaning of ICC's Himalaya clause. Furthermore, shippers have a vital interest in opposing the broad construction of Himalaya clauses, as proposed by petitioner and others, since that could create a disincentive for carriers to take proper care of the goods and deliver them in a timely fashion. Excusing negligent parties from the consequences of their misconduct through an unprecedented and expansive interpretation of Himalaya clauses could undermine safety

and efficiency. Moreover, contrary to the railroad's position that the parties involved in an international multimodal shipment share a commercial expectation that the lowest liability limit shall apply, the expectation of shippers is that they will be subject to and get the benefit from only those contracts in which they directly participate.

The amici herein have a direct and substantial interest in the outcome of this case and urge this Court to affirm the Eleventh Circuit's decision.

A. Shippers' Use of Ocean Transportation Intermediaries

The transportation of goods by sea from one country to another using carriers providing international intermodal transportation services has evolved over the past decades to allow for the safe, efficient and transparent shipment of goods around the world. Although the international carriage of goods on a "through" basis can be considered complex because it involves multiple parties and modes of transportation,[4] from the perspective of the shipper tendering the cargo and/or the receiver of the goods at the destination, the transportation process can be stream-lined and effectively managed through the choice of service provider and the contracts with that provider.

When a company needs to import or export cargo across the sea, it may choose to hire an ocean carrier directly, or it may choose a transportation intermediary skilled in the area of ocean transportation. A shipper that hires an ocean transportation intermediary may do so for any number of reasons, including, *inter alia,* to secure better pricing than it can obtain on its own; to obtain assistance in navigating the intricacies of ocean shipping from an expert knowledgeable

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[4] Sorkin, *supra*, at §§ 1.12[3] and 1.13.

in the field; or to meet its commercial needs based on the variety of services offered by the intermediary.

For example, an intermediary that operates as a consolidator often can get a shipper with smaller volumes of cargo (i.e., less than a full container load) a better price than the shipper can obtain on its own because the intermediary may consolidate the shipper's cargo with other shippers' cargo. A shipper with limited experience in international transportation may hire an intermediary for its skill and knowledge in arranging for the transportation of cargo, securing vessel space, consolidating cargo, preparing shipping documents, arranging for storage and/or inland transportation, and clearing cargo through customs. 46 C.F.R. § 515.2(l). In addition, the service offerings of some ocean transportation intermediaries, also referred to as third-party logistics providers, have grown tremendously over the past decade to include menus that permit "one-stop shopping" by shippers, such that the intermediary handles nearly every aspect of the shipper's logistics function and serves as its primary carrier.[5]

In short, for the variety of reasons indicated above, but also because transportation is not the shipper's primary business (it may be manufacturing, retail, technology, or some other business sector), many shippers choose to hire an intermediary that specializes in the field of international transportation.

B. Regulation of Ocean Transportation Intermediaries in the United States

In the United States, ocean transportation intermediaries are regulated under the Shipping Act. The Shipping Act recognizes two types of ocean transportation intermediaries: (1) NVOCCs and (2) ocean freight forwarders. An NVOCC is defined as "a common carrier that does not operate the

[5] *See* William J. Augello, TRANSPORTATION, LOGISTICS AND THE LAW at 192 (2001).

vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier." 46 U.S.C. App. § 1702(17)(B). Thus, an NVOCC serves a dual role. As to its shipper customer, it is a common carrier that holds out to provide the transportation service for compensation and assumes responsibility (or liability) to deliver the cargo safely to the destination. 46 U.S.C. App. § 1702(6). An NVOCC issues to its shipper customer its own bill of lading, which identifies the NVOCC as the carrier performing the service. The NVOCC must also adhere to rules and requirements applicable to common carriers, including, *inter alia*, the requirements to publish prices in a tariff, charge only the tariff rates, and refrain from unjustly discriminating between customers. 46 U.S.C. App. §§ 1707(a) and 1709(b). As to the ocean carrier that the NVOCC hires to physically transport the cargo, the NVOCC is itself the shipper. Indeed, the cargo owner and the NVOCC each independently qualify as a "shipper" under the definition of that term in the Shipping Act. 46 U.S.C. App. § 1702(21)(A) and (E).

An ocean freight forwarder is not a common carrier. It is defined as a person in the United States that "dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments *on behalf of shippers*." 46 U.S.C. App. § 1702(17)(A) (emphasis added). When the ocean freight forwarder arranges ocean transportation, it does not issue a bill of lading; rather, only the ocean carrier issues one. Furthermore, the ocean freight forwarder does not appear as the shipper on this bill of lading. Instead, this document identifies the underlying shipper as the "shipper" and the ocean carrier as the "carrier." The rules of the Federal Maritime Commission ("FMC"), the federal agency charged with administering the Shipping Act, expressly recognize the ocean freight forwarder/shipper rela-

tionship as one of agency.[6] Based on this agency status, only an ocean freight forwarder, but not an NVOCC, is subject to special duties and obligations with respect to its principal, the shipper. *See* 46 C.F.R. § 515.32. Thus, although NVOCCs and ocean freight forwarders are both ocean transportation intermediaries under the Shipping Act, there are distinct differences in their status and in how they are regulated.

C. The Commercial Relationships and Dealings Between Shippers, Ocean Transportation Intermediaries, and Vessel Operators

The regulatory structure established by the Shipping Act influences shippers' choices when selecting intermediaries to assist in international transportation arrangements. When a shipper chooses an NVOCC, its expectation is that it is dealing with a carrier who will be responsible to perform all aspects of an international intermodal movement. Typically, a shipper and NVOCC agree in advance upon pricing and other terms applicable to the shipment, depending on the services required by the shipper. The NVOCC then publishes the applicable rate in its tariff and issues a bill of lading to the shipper. The bill of lading serves as the contract of carriage and as the receipt for the cargo. *Tokio Marine & Fire Ins. v. M/V L. Jalabert Bontag*, 624 F. Supp. 402, 407–408 (n.5) (S.D.N.Y. 1985). In the case of a shipment moving across the sea from an inland origin to an inland destination, the NVOCC bill of lading usually covers the shipment in its entirety, "door-to-door."

[6] *See* 46 C.F.R. §§ 515.32 and 515.42(a). Ocean freight forwarders have also been determined to be in a fiduciary relationship with their principal, the shipper. *United States v. Ventura*, 724 F.2d 305, 311 (2d Cir. 1983).

For shipments involving the United States, the NVOCC bill of lading is subject to COGSA.[7] In general, the COGSA liability limits apply to claims made against the NVOCC for cargo loss or damage, unless the parties agree to increase the NVOCC's liability, usually in exchange for a higher transportation rate. 46 U.S.C. App. § 1304(5). Although COGSA does not apply to inland transportation or to services outside those performed "tackle-to-tackle,"[8] the NVOCC's bill of lading may include a Himalaya clause that extends the liability provisions in the bill of lading to its agents and contractors involved in the performance of the transportation service. However, there is no uniform Himalaya clause and the scope and breadth of such clauses vary widely across carrier bills of lading.

When a shipper hires an NVOCC to transport a through shipment, it may know that subcontractors, such as ocean and inland carriers, are likely to be involved with the shipment. However, from the shipper's perspective, it is dealing *only* with the NVOCC and is a party to and involved in *only* a single contract between itself and the NVOCC (i.e., the NVOCC bill of lading). The shipper does not direct, control or have any involvement with the contract between the NVOCC and the ocean carrier or the contract between the ocean carrier and any other contractor it may hire. As demonstrated in this case, the liability terms under the NVOCC's bill of lading may not be identical to those in the ocean carrier's bill of lading issued for the same shipment. Indeed, the terms of bills of lading issued by different carriers, whether they be NVOCCs or ocean carriers, are rarely, if ever, exactly the same.

[7] 46 U.S.C. App. § 1300. *See also In re The M.V. Floreana*, 65 F. Supp.2d 489, 491 (S.D. Tex. 1999).

[8] Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW § 10–16 (4th ed. 2004).

Moreover, it is entirely possible that the NVOCC and the ocean carrier it hires will enter into a confidential agreement, other than a bill of lading, known in the U.S. trades as a service contract.[9] A service contract is subject to certain minimal regulation under the Shipping Act and is required to be filed confidentially with the FMC. 46 U.S.C. App. § 1707(c)(2). These contracts are required to include certain terms, such as rates, shipper volume commitment, carrier service commitment, commodity, and origins and destinations, among others. *Id.* A service contract may also include liability terms for cargo loss or damage.[10] After these contracts were permitted to be entered into confidentially, through amendments to the Shipping Act adopted in 1998,[11] they quickly became the overwhelmingly preferred manner of conducting shipping business in the U.S. trades.[12] Thus, whenever an NVOCC and ocean carrier enter into a confidential service contract that includes the ocean carrier's liability for cargo damage, the underlying shipper has no right to access or review that agreement. Although an NVOCC may enter into a service contract with an ocean carrier (based on its status as a shipper), it is prohibited under the Shipping Act from entering into such an agreement with its shipper customer.[13]

Not only does a shipper lack control over and access to contractual terms between the NVOCC and the ocean carrier,

[9] 46 U.S.C. App. § 1702(19).

[10] A confidential contract may expressly address the matter of cargo liability or it may incorporate the liability terms included in the ocean carrier's bill of lading.

[11] Sec. 106 of the Ocean Shipping Reform Act of 1998, 46 U.S.C. App. § 1707(c)(2).

[12] Federal Maritime Commission, THE IMPACT OF THE OCEAN SHIPPING REFORM ACT OF 1998 at 17 and 84 (2001).

[13] The definition of "service contract" in 46 U.S.C. App. § 1702(19) refers only to "ocean" common carriers, thereby excluding NVOCCs.

the shipper does not select the contractors that will physically transport the goods. Carrier selection, routing, and other details of the transportation operations are left to the NVOCC and its subcontractors. Although the shipper's contract with the NVOCC may include the name of the vessel on which the goods will be carried, that information alone is often insufficient for a shipper to identify the ocean carrier performing the transportation because of the common practice of vessel sharing arrangements ("VSAs"), which are prevalent around the world.[14] Under VSAs, ocean carriers enter into agreements that are filed with the FMC and that permit the members of the agreement to charter space (or slots) on the other carrier members' ships.[15] In these arrangements, an ocean carrier that issues a bill of lading to an NVOCC (or any other shipper) may arrange for the cargo to be transported on another ocean carrier's vessel. Thus, if a shipper that contracts with an NVOCC knows only the name of the vessel on which its cargo will be carried, in many cases, the owner or operator of that vessel will not be the carrier whose bill of lading is issued to the NVOCC.

Finally, if a shipper using an ocean transportation intermediary desires more control over the transportation providers and the terms of the applicable contracts, it can hire an ocean freight forwarder instead of an NVOCC. When dealing with an ocean freight forwarder, the shipper obtains both transparency and contractual privity between itself and the ocean carrier. In international ocean-going shipments arranged by an ocean freight forwarder, the ocean carrier issues its bill of lading directly to the shipper and, under the FMC's rules, the forwarder may only be listed on the bill of

[14] Federal Maritime Commission, THE IMPACT OF THE OCEAN SHIPPING REFORM ACT OF 1998 at 26 (2001).

[15] Mary T. Reilly, *Symposium: Identity of the Carrier: Issues Under Slot Charters*, 21 TUL. MAR. L. J. 505, 506 (2001).

lading as the shipper's agent.[16] In sum, when a shipper uses an ocean freight forwarder, the forwarder serves as the shipper's agent, and the shipper has direct access to and knowledge of the liability and other contractual terms applied by the ocean carrier.

SUMMARY OF ARGUMENT

The Eleventh Circuit properly concluded that ICC was not the agent of Kirby when it contracted with the ocean carrier, Hamburg Sud, and thus Kirby was not bound by Hamburg Sud's bill of lading. ICC was an entity that appeared to have acted as an NVOCC, which is a regulated intermediary under the Shipping Act that operates in the dual capacity of a common carrier vis-à-vis its shipper customer and a shipper vis-à-vis the ocean carrier. An NVOCC holds a different regulatory status than an ocean freight forwarder, which unquestionably operates as a shipper's agent. The creation of a new rule that would define an NVOCC as the shipper's agent would undermine the currently clear regulatory distinctions between NVOCCs and ocean freight forwarders. The commercial dealings between a shipper and an NVOCC also fail to support an agency relationship. A shipper hires an NVOCC for its expertise in the business of international transportation, and the NVOCC performs the transportation service without supervision or control by the shipper. The NVOCC acts as an independent contractor and represents its own interest in its dealings with the ocean carrier.

Because the shipper has no involvement with the arrangements between the NVOCC and the ocean carrier and is unaware of the terms of the ocean carrier's bill of lading, it is both inappropriate and unfair to enforce against the shipper contract terms that it did not have the right or opportunity to

[16] 46 C.F.R. § 515.42(a) ("The licensed freight forwarder's name may appear with the name of the shipper [on the bill of lading], but the forwarder must be identified as the shipper's agent.")

accept. Subjecting a shipper to two separate and inconsistent contracts of carriage for the same shipment would not only adversely affect the shipper's right to recover cargo losses from negligent parties but could also subject the shipper to conflicting obligations or unanticipated claims by the ocean carrier.

Petitioner and its supporting amici claim that ICC's bill of lading put Kirby on notice of the ocean carrier's participation in the transportation service because it identified the name of the vessel on which the cargo was transported. However, because of the prevalence of vessel sharing arrangements between ocean carriers, the fact that a shipper may know the name of the vessel does not enable the shipper to identify the ocean carrier that contracts with the NVOCC. Indeed, in this very case, the vessel *Queensland Star* that was listed on ICC's bill of lading was not owned or operated by Hamburg Sud, the contracting ocean carrier. Rather, it was owned by another ocean carrier, Blue Star Line, which participated in a space sharing agreement with Hamburg Sud. Thus, the information on ICC's bill of lading could not have led Kirby to reasonably expect that it would be bound by Hamburg Sud's bill of lading terms. Furthermore, the argument by an amicus for petitioner that the shipper is bound by the ocean carrier's bill of lading under the filed rate doctrine fails because the filed rate doctrine applies only to the shipper and carrier parties to the transportation contract. Because Kirby is not a party to the Hamburg Sud bill of lading, it is not bound to that contract by the filed rate doctrine.

Moreover, because the ocean carrier obtains the statutory protection of COGSA upon issuance of its bill of lading, and because there are commercial solutions available that would allow the ocean carrier and its subcontractors to manage any exposure to greater liability than provided under the ocean carrier's bill of lading, the decision of the Eleventh Circuit does not disrupt the policies of COGSA. Finally, state law tort remedies against inland carriers are not preempted by

COGSA or any other federal statute, and the decision below does not cause the ocean carrier to violate antidiscrimination provisions under the Shipping Act. Discrimination does not result if the factual circumstances surrounding the shipment justify different treatment between the carrier's customers.

ARGUMENT

I. THE ELEVENTH CIRCUIT'S RULING THAT ICC WAS NOT THE AGENT OF KIRBY IS CONSISTENT WITH THE SHIPPING ACT OF 1984 AND THE PRINCIPLES OF AGENCY LAW

Petitioner and its supporting amici mistakenly argue that Kirby must be bound by the terms of the underlying ocean carrier's bill of lading because the NVOCC purportedly contracts with that carrier as the shipper's agent. The regulation of NVOCCs under the Shipping Act and the law of agency squarely refute their contention.

A. NVOCCs Are Not the Agents of Shippers Under the Shipping Act.

As explained above, the Shipping Act clearly distinguishes between two types of ocean transportation intermediaries: An ocean freight forwarder, which serves as the agent of the underlying shipper, and an NVOCC, which does *not* serve as the agent of the underlying shipper. The words of the statute establish that an ocean freight forwarder acts *on behalf of shippers*,[17] whereas an NVOCC serves the dual status of both a common carrier and a shipper.[18] The "carrier/shipper" relationship between the NVOCC and its customer does not translate to an "agency." Rather, it is akin to a "seller/buyer" relationship. Although an NVOCC is also a shipper in its

[17] 46 U.S.C. App. § 1702(17)(A)(i).

[18] 46 U.S.C. App. § 1702(17)(B).

dealings with the ocean carrier, the NVOCC's status in that relationship does not transform the NVOCC/Shipper relationship into agency, particularly aince the underlying shipper lacks control over the NVOCCs dealings with the ocean carrier. Furthermore, an NVOCC independently qualifies as a "shipper," *in addition to* the cargo owner and the receiver of the goods, under the definition of that term in the Shipping Act. 46 U.S.C. App. § 1702(21)(E). The inclusion of an NVOCC in the "shipper" definition, which notably excludes ocean freight forwarders, further supports that an NVOCC does not serve as the underlying shipper's agent. If it were the shipper's agent, then two different parties would become the "actual" shipper for the same shipment for regulatory purposes. Such a result would be illogical and cause substantial confusion in the administration of the Shipping Act.

In addition to the statute's regulatory distinctions, the rules of the FMC do not support petitioner's agency argument. As noted above, the FMC's rules characterize a shipper's relationship with an ocean freight forwarder as that of "principal and agent."[19] However, no such comparable agency status has been conferred upon the shipper/NVOCC relationship. And, for the FMC to do so would make no sense, since the statute defines that relationship to be "shipper/carrier."

A finding by this Court that ICC was acting as the agent of Kirby when it contracted with Hamburg Sud would result in a rule that fundamentally alters the regulatory status of NVOCCs. It would also unnecessarily blur the currently clear distinctions between NVOCCs and ocean freight forwarders, causing substantial confusion for both the regulators of the industry and the commercial parties who have dealings with NVOCCs. Moreover, if this Court were to

[19] 46 C.F.R. §§ 515.2(q), 515.32, 515.33, 515.41, and 515.42.

conclude, solely for the purpose of COGSA, that the status of an NVOCC differs from the independent contractor status established under the Shipping Act, then it would be creating an inconsistency between two federal laws. It is a long-standing rule that federal statutes should be interpreted consistently to the greatest extent possible.[20] That rule should be particularly applicable here when the two statutes involved both pertain to ocean transportation matters. Thus, this Court should avoid creating such a conflict, which would result if ICC is found to be Kirby's agent.

It is also significant that the government, which is supporting the petitioner in this case, agrees that ICC was not acting as the agent of Kirby when it entered into the contract with Hamburg Sud, based in part on its NVOCC status. The government's brief, which includes the FMC, as well as other agencies experienced in shipping and other transportation modes, specifically states:

> ICC was not Kirby's "agent" as that term has traditionally been understood at common law, since no fiduciary relationship existed and Kirby lacked authority to direct and control ICC in its performance of the contract. Furthermore, *because ICC assumed the responsibilities of a common carrier, it was not the type of transportation intermediary that has historically been characterized as the shipper's "agent."* Government Brief, at 12 (emphasis added).

B. Shippers Do Not Direct or Control the Performance of NVOCCs.

The agency theory advanced by the petitioner and its supporting amici also fails under common law agency principles. This Court has stated that "[a]gency is the fiduciary relation which results from the manifestation of

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[20] *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519, 566–567 (n. 22) (1979).

consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *General Bldg. Contractors Ass'n v. Pa.*, 458 U.S. 375, 392 (1982) (citation omitted). The essential elements of an agency arrangement are the principal's ability to direct and control the agent and the fiduciary relationship. *Id.* at 393. In the shipping industry, shippers do not control, or have the right to control, NVOCCs that furnish transportation services. A shipper hires an NVOCC for a variety of reasons, including its skill and experience in moving goods from point A to point B. Shippers provide the cargo and the NVOCC arranges for the performance of the desired transportation services, relying on its own transportation expertise and dealings with other carriers and service providers. As the NVOCC's customer, the shipper is not involved in this process. It typically does not select the ocean carrier or other downstream service providers. It does not control the routing of the shipment or other operational details of the transportation movement. And, the shipper does not have any control over the contractual terms negotiated by the NVOCC and the underlying ocean carrier. Because of the absence of the requisite "control" element, the shipper is not a "principal" and the NVOCC is not an "agent" under agency law.

A recent motor carrier case is instructive on this point. In *Jackson Rapid Delivery Service v. Thomson Consumer Electronics*, 210 F. Supp.2d 949 (N.D. Ill. 2001), the court found that a transportation broker did not act as the shipper's agent and could not bind the shipper to certain motor carrier bills of lading. The court noted that the broker "had independent control over picking motor carriers, negotiating a rate with the carriers, and purchasing its own supplies." *Id.* at 954. Also, the broker entered into separate transportation service contracts with the carriers. *Id.*

A shipper's dealings with an NVOCC are no different. The contract between the NVOCC and the shipper does not

create a fiduciary relationship. It is an arms-length deal, no different from ordinary commercial transactions that, under settled law, do not give rise to fiduciary duties. *See South Atlantic Ltd. v. Riese*, 284 F.3d 518, 533 (4th Cir. 2002); *Thomas v. Chase Manhattan Bank*, 1 F.3d 320, 328 (5th Cir. 1993); *First Citizens Fed. Sav. & Loan v. Worthen Bank & Trust*, 906 F.2d 427, 431 (9th Cir. 1990). Indeed, the NVOCC is free to charge the shipper the highest price that the market will bear for the transportation service and is not constrained to offer the shipper the most competitive price it can find. In each transaction, the NVOCC pursues its own interest to maximize its own profit. Because the NVOCC does not necessarily align its interest with the shipper's no fiduciary relationship arises. In this case, the facts do not lead to a contrary conclusion. There is no evidence that Kirby directed or controlled ICC's handling of the shipment, and ICC's status as an NVOCC is otherwise inconsistent with agency principles.

II. REVERSAL OF THE ELEVENTH CIRCUIT'S RULING ON THE AGENCY QUESTION WOULD INTERFERE WITH A SHIPPER'S CONTRACTUAL FREEDOMS AND CAUSE SUBSTANTIAL UNCERTAINTIES

The creation of a new agency rule in order to bind the shipper to the NVOCC's contract with an ocean carrier would significantly interfere with the contractual rights of the shipper. As explained above, when a shipper hires an NVOCC, it deals only with the NVOCC. The shipper has no involvement with the ocean carrier that the NVOCC selects to perform the transportation. It would be patently unfair to bind a shipper to the ocean carrier's bill of lading given the shipper's lack of participation in the contract and its lack of knowledge of the terms of the contract.

Even if the shipper knew the identity of the ocean carrier, the shipper would not have the opportunity to review, object to, or accept the contractual terms to which it would become bound, if the NVOCC is found to be its agent. A result of this sort would completely interfere with the shipper's basic right of "Freedom to Contract." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty."); *Adams v. Unione Mediterranea Di Sicurta*, 364 F.3d 646, 652 (5th Cir. 2004) ("Under general principles of contract law, it is axiomatic that courts cannot bind a non-party to a contract, because that party never agreed to the terms set forth therein.") (citation omitted). Furthermore, it would defeat one of the purposes of hiring the NVOCC in the first place, which is to allow the shipper to reduce the number of contracts and parties involved in the transaction.

In addition, the agency rule desired by petitioner would force a single shipper into two different contracts of carriage with two different carriers for the same shipment, creating consequences that are uncertain at best and harmful to the shipper at worst. Because there is no uniform bill of lading prescribed for international intermodal shipments, the liability limits and other terms included in the NVOCC bill of lading may be entirely inconsistent with those included in the vessel operator's bill of lading. The NVOCC, who often acts as a consolidator, does not necessarily have the same interest and bargaining power as the shipper. Typically, the NVOCC relies on cargo volumes from many different shippers in its negotiation with the ocean carrier, and therefore it may be able to secure better pricing and liability terms than any of its individual customers. The statement of an amicus supporting petitioner that "ICC could sell to Kirby only what ICC was able to buy from Hamburg Sud" is simply inaccurate. Brief of the World Shipping Council at 16.

While a shipper should be held to the benefit of its bargain with the NVOCC, there simply is no bargain for the shipper with respect to the ocean carrier's bill of lading. In fact, as demonstrated by this case, the ocean carrier's bill of lading may include more onerous liability terms than were part of the shipper's contract with the NVOCC. The new agency rule desired by petitioner not only would impede a shipper's rights to recover cargo losses from negligent parties, but also is likely to have an impact that reaches beyond the matter of cargo liability. Ocean carrier bills of lading contain numerous contractual terms affecting a wide range of issues. If an NVOCC is found to be the agent of the shipper when it contracts with the ocean carrier, presumably the shipper would become bound to *all* of the terms included in the ocean carrier's contract, including freight obligations, indemnities, and designated forum for claims, among others. The unfairness and uncertainties that would be created by the agency rule further justify an affirmance of the decision below.

III. THE FILED RATE DOCTRINE DOES NOT BIND KIRBY TO THE HAMBURG SUD BILL OF LADING

An amicus supporting petitioner wrongly argues that it is proper to bind the shipper to the underlying ocean carrier's bill of lading because the shipper that engages an NVOCC knows that a second bill of lading will be issued, and can be held to have knowledge of the terms of that bill of lading pursuant to the filed rate doctrine. World Shipping Council Br. at 17. This argument is premised on the fact that the Shipping Act requires common carriers to publish the terms of bills of lading in their tariffs. 46 U.S.C. App. § 1707(a)(1)(E). However, this claim is mistaken in both fact and law. Assuming the shipper knows of an ocean carrier's

involvement,[21] there remain a number of reasons why it will not be able to easily identify the specific ocean carrier hired by an NVOCC to transport its cargo, locate that ocean carrier's tariff, and review the bill of lading in the tariff in time to object to any inconsistent or unacceptable terms. First, for practical reasons, the NVOCC is likely to have dealings with numerous ocean carriers, and the bill of lading that it issues to the shipper may not specifically identify the underlying carrier. In fact, as was the case here, the cargo may have sailed before the shipper even obtains the NVOCC's bill of lading. In addition, the NVOCC intentionally may not identify the underlying carrier because doing so would assist the shipper in determining the NVOCC's mark-up over the ocean carrier's rate. Furthermore, a shipper may not be able to identify the ocean carrier because its identity could be disguised, if the initial NVOCC contracts with a second NVOCC that, in turn, hires the ocean carrier, causing multiple bills of lading to be issued.

Second, even if the name of the vessel appears on the NVOCC's bill of lading, the shipper cannot necessarily identify the ocean carrier that has contracted with the NVOCC because, as noted earlier, ocean carriers regularly share space on each other's vessels. Under vessel sharing arrangements, cargo "booked" under one carrier's bill of lading may actually be transported on another carrier's vessel. Reilly, *supra*, at 510. In fact, in this case, the vessel *Queensland Star,* on which Kirby's cargo was transported and which was identified in ICC's bill of lading, was not owned or operated by the underlying ocean carrier, Hamburg

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[21] Initially, the amicus asserts that whenever a shipper hires an NVOCC, it always knows that the NVOCC is not the ocean carrier and that an actual ocean carrier will move its cargo. This may be true on most occasions, but it is certainly not correct on all. Thus, it is inaccurate to posit that the shipper always knows that a second agreement is in play each time it engages an NVOCC.

Sud. Rather, it was owned by another ocean carrier, Blue Star Line, which participated in a vessel sharing agreement with Hamburg Sud and others.[22] Kirby's knowledge of the vessel name could not have enabled it to determine the identity of the ocean carrier that actually contracted with ICC to transport the cargo. Thus, Kirby could have no reasonable expectation that it would be bound by Hamburg Sud's bill of lading.

In fact, even assuming, *arguendo*, that the only ocean carrier bill of lading that Kirby reasonably could have expected to apply is that of Blue Star Line, since that carrier was the owner of the vessel named on ICC's bill of lading, the liability terms in Blue Star Line's bill of lading are significantly different from those in the Hamburg Sud bill of lading. *See* Exhibit 1, para. 5(B)(2)(d). Specifically, with respect to through shipments (or "combined transport") the Blue Star bill of lading establishes that for inland transportation procured by the ocean carrier, the responsibility of the ocean carrier is subject to the "inland carrier's contracts of carriage and tariffs." Exhibit 1, para. 5(B)(2)(d). Thus, under the liability structure of the Blue Star

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[22] *See Blue Star's M.V. "Queensland Star" 2.* http://www.bluestarline.org/act/act6.html (visited May 27, 2004) (detailing the ownership of *Queensland Star*). In addition, at the time of the shipment, Hamburg Sud participated in several ocean carrier agreements that permitted vessel sharing in the Australia trades with other carriers, including Blue Star Line. These agreements include (1) the *Columbus/Pace Cross Charter Agreement*, No. 217-010746, 50 Fed. Reg. 15224 (April 17, 1985), which was amended several times over the years, *see Columbus/PACE/SCNZ/BSL/PAD Space Charter and Sailing Agreement*, 52 Fed. Reg. 31446 (Aug. 20, 1987) and 58 Fed. Reg. 43360, 43361 (Aug. 16, 1993); (2) *Australia/United States Containerline Association Agreement*, No. 202-011497-001, 61 Fed. Reg. 1934 (Jan. 24, 1996); and (3) *United States/Australasia Interconference and Carrier Discussion Agreement*, as amended in 1993, No. 203-011117-015, 58 Fed. Reg. 37482, 37483 (July 12, 1993).

bill of lading, it would not have been reasonable for Kirby to have anticipated that maritime liability limits would apply to inland carriers.

In short, it is fairly certain that the shipper will not easily be able to locate and review the relevant tariff and bill of lading of the underlying ocean carrier. However, even assuming that a shipper could timely determine and obtain a copy of the ocean carrier's bill of lading, if the shipper finds objectionable contract terms, it cannot change them. It is patently unfair to bind the shipper to terms that are unknown or, even if discovered, are ultimately immutable.

Furthermore, amici for petitioner offer a strained legal interpretation of the filed rate doctrine to support the argument that Kirby should be held by operation of law to have notice of Hamburg Sud's bill of lading because that bill of lading is required to be published in Hamburg Sud's tariff. It is true that "carriers and shippers alike are charged with constructive notice of tariff filings." *Security Servs. v. Kmart Corp.*, 511 U.S. 431, 443 (1994). However, it is *not* true that an ocean carrier can enforce its tariff against a party with whom it does not have any dealings or a contract: The filed rate doctrine applies between the shipper and the carrier, as parties to the transportation contract. *See Maislin Indus. v. Primary Steel*, 497 U.S. 116, 126 (1990) ("This Court has long understood that the filed rate governs the legal relationship between shipper and carrier."); *Keogh v. Chicago & N. R. Co.*, 260 U.S. 156, 163 (1922) ("The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper.") Thus, because Kirby is not a party to the Hamburg Sud bill of lading, it cannot be charged with knowledge of the terms of that contract. Indeed, it would be a novel and improper extension of the filed rate doctrine to

charge a stranger to the transportation contract with constructive knowledge of the underlying carrier's tariff.

IV. THE ELEVENTH CIRCUIT'S DECISION DOES NOT DISRUPT THE COGSA SCHEME

Petitioner and its supporting amici claim that, under the decision below, ocean carriers and their subcontractors will be unable to rely on COGSA's liability limits for shipments tendered by NVOCCs, which will cause substantial uncertainty and disturb ocean carrier pricing practices. This argument drastically overstates the impact of the Court of Appeals' decision and ignores the fact that there are commercial solutions available that would allow the underlying carriers and contractors to manage any liability risks created by the decision. First, ocean carriers will rarely lose the protection of a liability limitation. Once the ocean carrier issues its bill of lading, it triggers the statutory liability limits and defenses provided under COGSA, assuming the damage occurs during the "tackle-to-tackle" period.[23] Second, most NVOCC bills of lading include Himalaya clauses that will extend the benefits of COGSA (or another limited liability regime) at least to the ocean carrier—typically the first servant in the chain of providers for NVOCC cargo.

Whether the COGSA liability limit should be extended to other agents and contractors of the ocean carrier is not a statutory right but is purely a commercial matter. In fact, well before the Eleventh Circuit's ruling, there was no guarantee that an ocean carrier's Himalaya clause would be found to apply to an inland carrier, since the applicability of

[23] *La Seguridad v. Transytur Line*, 707 F.2d 1304, 1310 n.10 (11th Cir. 1983) ("[T]he Carriage of Goods by Sea Act (COGSA) applies *ex proprio vigore* to every bill of lading which evidences a contract for the carriage of goods by sea to or from ports of the United States in foreign trade.")

the clause depends on its specific wording.[24] The uncertainty in the application of Himalaya clauses that petitioner argues is created by the Eleventh Circuit's decision to some degree already exists today. However, the underlying carriers and contractors that accept NVOCC cargo can adequately manage the risk that they may not obtain the benefit of a Himalaya clause through everyday commercial means, including the use of indemnity clauses that would provide protection against potential liability above and beyond COGSA's liability limits. Moreover, before accepting a shipment, the ocean carrier could also request that the NVOCC provide it with a copy of its bill of lading, or it could obtain a copy from the NVOCC's tariff.

It is not overly burdensome or unrealistic for ocean carriers, railroads, and other contractors involved in through transportation to undertake such actions when dealing with NVOCC cargo. As noted above, ocean carriers and NVOCCs already negotiate, under the Shipping Act, confidential service contracts that include a package of terms relating to international intermodal transportation. Thus, an ocean carrier could seek to address the matters of cargo liability limits and related indemnities in a service contract and/or it may include an indemnity clause in the terms of its bill of lading. It would also not be out of the ordinary or inefficient for contractors of the ocean carrier to seek in their contracts with the ocean carrier indemnities that protect their interests, and ocean carriers could then insure against any known risks. These entities already enter into commercial agreements relating to the transfer of cargo between the various modes of transport and could simply include appropriate risk allocations in these agreements. On the other hand, it would be inappropriate for this Court to create a special agency rule

[24] *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 305 (1959) (extension of COGSA liability limit must be clearly expressed in bill of lading language).

aimed at expanding COGSA's liability limits to inland carriers, since that is a matter better left for Congress.

V. THE ELEVENTH CIRCUIT'S DECISION IS NOT PREEMPTED

There is no basis for amicus United States' argument that a shipper's state law cause of action against the underlying carrier or its agents for injury to goods is preempted. Generally speaking, this Court recognizes preemption (i) where Congress expressly legislates that result in the text of a statute; (ii) where that result is implied by federal statute; or (iii) where state law conflicts with federal law. *International Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987). However, because of concerns for federalism, this Court is reluctant to find that federal law preempts state law. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978). Here, the United States has not identified a single section of COGSA (or any other federal statute) that expressly mandates preemption of state law causes of action for injury to goods. *See Associated Metals and Minerals Corp. v. Alexander's Unity MV*, 41 F.3d 1007, 1016 (5th Cir. 1995) ("In the more than half century that COGSA has existed, no circuit has indicated that, through COGSA, Congress intended to eliminate the tort cause of action for damage to cargo. Nor does the legislative history of COGSA manifest such an intent.") Implied preemption, in turn, arises where Congress "has adequately indicated an intent to occupy the field of regulation, thereby displacing all state laws on the same subject." *Brown v. Hotel & Restaurant Employees & Bartenders Int'l*, 468 U.S. 491, 501 (1984). As explained by this Court, Congress's purpose in enacting COGSA was to "establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade." *Herd & Co.*, 359 U.S. at 301. In pursuing this narrow objective, Congress did not occupy the field of liability for injury to goods transported by an underlying ocean carrier or

its agents, and thus did not displace state law. *See Associated Metals and Minerals Corp. v. Alexander's Unity MV*, 41 F.3d at 1016. Finally, a shipper's state law cause of action against an underlying carrier or its agents is not barred by conflict preemption. Such a suit would not stand as an obstacle to enforcement of federal law because COGSA would continue to apply between the shipper and the NVOCC and the NVOCC and the underlying carrier.

In an effort to bolster its preemption argument, the government posits that allowing state law causes of action against underlying carriers and their agents would disrupt the ocean carrier industry's pricing practice of linking transportation rates to liability exposure. However, this pricing practice within the industry is not prescribed by COGSA or any other federal law. As such, it should not, and does not, override causes of action existing under state law.

The United States is also incorrect in asserting that the decision below would cause ocean carriers to violate the Shipping Act's provisions prohibiting discrimination. The government's argument is apparently premised on different liability limits or rates that may apply, on the one hand, to the proprietary shipper, and on the other hand, to the NVOCC. However, assuming that antidiscrimination principles even apply in the context of the decision below, which is uncertain at best, the prohibitions against unjust discrimination and undue preferences in common carrier transportation have always been applied with regard to the specific circumstances and conditions relevant to the transportation at issue. *Eastern-Central Motor Carriers Ass'n v. United States*, 321 U.S. 194, 202 (1943). *See Household Goods Forwarders Ass'n v. American Export Lines*, 20 F.M.C. 496, 497 (1978) ("The existence of unjust discrimination is a factual question which depends upon more than a bare difference in rates on similar commodities. . . The decided cases reveal that a variety of rate discriminations are permissible in the presence

of justifying transportation conditions."), *aff'd Household Goods Forwarders Ass'n v. F.M.C.*, 627 F.2d 478 (D.C. Cir. 1980). Where conditions and circumstances are not substantially similar, differences in rates may be justified. *L.T. Barringer & Co. v. United States*, 319 U.S. 1, 6–7 (1943). *See Port of Houston v. Lykes Bros. Steamship Co.*, 19 F.M.C. 192, 199 (1976) ("It has long been established that not all preferences or advantages offered by carriers are condemned by law, but only those that are undue or unreasonable violate the Shipping Act.") Here, any rate or liability differentiation that was based on a varied risk as to the ocean carrier's liability exposure in handling goods tendered by an NVOCC, versus the cargo owner, would not violate the antidiscrimination provisions. *See Plaquemines Port, Harbor and Terminal Dist. v. FMC*, 838 F.2d 536 (D.C. Cir. 1988); *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261 (1968). Accordingly, there is no merit to the United States' contention that allowing shippers to pursue remedies available under state law would cause ocean carriers to violate antidiscrimination provisions of federal law.

CONCLUSION

Because ICC was not the agent of Kirby, Kirby was not bound by Hamburg Sud's bill of lading. Additionally, the Himalaya clause in ICC's bill of lading did not extend COGSA's liability limits to Norfolk Southern. Thus, the Eleventh Circuit's decision should be affirmed

Respectfully submitted,

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May 28, 2004

[redacted]

Consigned to the order of

ORDER

Blue Star (North America) Limited

Agents: P&O Containers Pty Limited
(A.C.N. 000 513 077) P&O CONTAINERS LTD
ARBN 074 877 562

Notify Party/Address

[redacted]

Place of Acceptance (Applicable only when this document is used as a Combined Transport Bill of Lading)

[redacted]

Vessel and Voyage No.

COL AUSTRALIA 124N

Port of Loading

BRISBANE

Place of Delivery (Applicable only when this document is used as a Combined Transport Bill of Lading)

PHILADELPHIA
USA

Port of Discharge

PHILADELPHIA

Container Nos. Marks and Nos.	Number and Kind of Packages; Description of Goods	Mass (kg)	Cube (cbm)
BSLY2711752	646 CARTONS	14419.8	0.000
Seal Number : DP1 035685			
PTI-9621	343 CTNS FRZN B/LESS BEEF		
PHIL	S-INS 14-18 LB		
	N 7699.0 / G 7939.1 KGS		
PTI-9621A	303 CTNS FRZN B/LESS BEEF		
PHIL	S-INS 14-18 LB		
	N 6720.8 / G 6932.9		
	REFRIGERATED CARGO		
	FREIGHT PREPAID		
	SERVICE CONTRACT NO: 96-20		
Approved establishment no(s) : 67,723			

Declaration of Value in accordance with paragraph 8(Bo)(iii)(3) over sale

* Total No. of

* Containers **********

Movement

FCL CUSTOMER /FCL FACILITY

Freight and Charges (Whether prepaid or collect)

AUST. HAUL/HANDOVER PREPAID
BSR ADDITIONALS PREPAID
BASIC/OCEAN FREIGHT PREPAID
POST SHIPMENT CHRGS COLLECT

Number of Original Bills of Lading

2 (two)

Shipped on board ocean vessel
COL AUSTRALIA at BRISBANE
on 17/12/96

Above Particulars as Declared by Shipper

Total Mass	Total Cube
14419.8	0.000

Accepted by the Carrier from the Shipper in apparent good order and condition (unless otherwise noted herein) the total number of containers or other packages or units indicated opposite * stated by the the Shipper to comprise the cargo specified above, for transportation subject to all the terms hereof (INCLUDING THE TERMS ON THE REVERSE HEREOF AND THE TERMS OF THE CARRIER'S APPLICABLE TARIFF) from the Place of Acceptance or the Port of Loading, whichever applicable, to the Port of Discharge or the Place of Delivery, whichever applicable. On presentation of this document duly endorsed to the Carrier, by or on behalf of the Holder, the rights and liabilities arising in accordance with the terms hereof shall (without prejudice to any rule of common law or statute rendering them binding upon the Shipper, Holder and Carrier) become binding in all respects between the Carrier and Holder as though the contract contained herein or evidenced hereby, had been made between them.
As far as this Bill of Lading covers COMBINED TRANSPORT, it is based on the uniform rules for a Combined Transport document ICC Brochure No. 298.

Place and Date of Issue:

BRISBANE 17/12/96

In Witness of the contract herein contained the number of originals stated opposite have been issued, one of which being accomplished the others to be void.

For Blue Star (North America) Limited as carrier

XXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXX COPY ONLY XXXXXXXX
XXXXX NOT NEGOTIABLE XXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXX

As Agents only

ESTAMENDED COPY

502500

APPENDIX 1a

CONDITIONS

1. DEFINITIONS

"Carrier" means Blue Star (North America) Limited on whose behalf this Bill of Lading has been signed.

"Merchant" includes the Shipper, Holder, Consignee, Receiver of the Goods, any person owning or entitled to the possession of the Goods or of this Bill of Lading and anyone acting on behalf of any such person.

"Holder" means any person for the time being in possession of this Bill of Lading to whom the property in the Goods has passed on or by reason of the consignment of the Goods or the endorsement of this Bill of Lading or otherwise.

"Goods" means the cargo accepted from the Shipper and includes any Container not supplied by or on behalf of the Carrier.

"Container" includes any container, trailer, transportable tank, flat or pallet or any similar article of transport used to consolidate goods.

"Carriage" means the whole of the operations and services undertaken by the Carrier in respect of the Goods.

"Combined Transport" applies when the Place of Acceptance and/or the Place of Delivery are indicated on the face hereof.

"Port to Port Shipment" applies where the Carriage called for by this Bill of Lading is not Combined Transport.

"Freight" includes all charges payable to the Carrier in accordance with the applicable Tariff.

2. CARRIER'S TARIFF

The terms of the Carrier's applicable Tariff are incorporated herein. Copies of the relevant provisions of the applicable Tariff are obtainable from the Carrier or his agents upon request. In the case of inconsistency between this Bill of Lading and the applicable Tariff, this Bill of Lading shall prevail.

3. WARRANTY

The Merchant warrants that in agreeing to the terms hereof he is, or has the authority of, the person owning or entitled to the possession of the Goods and this Bill of Lading.

4. SUB-CONTRACTING AND INDEMNITY

(1) The Carrier shall be entitled to sub-contract on any terms the whole or any part of the Carriage.

(2) The Merchant undertakes that no claim or allegation shall be made against any person whomsoever by whom the Carriage or any part of the Carriage is performed or undertaken (other than the Carrier) which imposes or attempts to impose upon any such person or any vessel owned by any such person any liability whatsoever in connection with the Goods whether or not arising out of negligence on the part of such person and if any such claim or allegation should nevertheless be made to indemnify the Carrier against all consequences thereof. Without prejudice to the foregoing every such person shall have the benefit of all provisions herein benefiting the Carrier as if such provisions were expressly for the benefit of such person and in entering into this contract, the Carrier, to the extent of these provisions, does so not only on his own behalf but also as agent and trustee for such persons.

5. CARRIER'S RESPONSIBILITY

(A) Port to Port Shipment

Where the Carriage called for by this Bill of Lading is a Port to Port Shipment, then

(1) the liability (if any) of the Carrier for loss of or damage to the Goods occurring from and during loading onto ship-going vessel up to and during discharge from that vessel or from whatever ship-going vessel onto which the Goods shall have been accompanied shall be determined in accordance with any convention law including the Hague Rules or The Hague-Visby Rules as amended by the Brussels Protocol of 23rd February, 1968 (hereinafter collectively referred to as the Hague Rules) or Shipowners and Bailors Act 1936 (Australia) or Bills of Lading Act 1936 (Australia) or Carriage of Goods by Sea Act 1924, the Canadian Water Carriage of Goods Act 1936, the Australian Carriage of Goods by Sea Act, 1991 and the New Zealand Sea Carriage of Goods Act 1979 or if there be no such ratified law, in accordance with the Hague Rules contained in the International Convention for the unification of certain rules relating to Bills of Lading dated 24th August, 1924. All the terms of this Bill of Lading (except (B) hereof) shall apply to such Carriage. Save that (i) any term in this Bill of Lading which is repugnant to the Hague Rules or the Hague Visby Rules (as the case may be) shall to that extent be void and inoperative and no further but not such void. Notwithstanding the above, the Carrier's liability, if any, shall be limited to loss of or damage to the Goods occurring from and during loading on to any ship-going vessel up to and during discharge from that vessel, and the carrier shall have no liability whatsoever for any loss or damage to the goods (whether it is actual or consequential) unless or such howsoever caused occurring before such loading or after such discharge. If necessary to the proper construction thereof the Carrier is hold liable for such loss or damage it shall nevertheless be entitled to the benefit of each limitation in section 4 (5) of U.S. Carriage of Goods by Sea Act, (1936) which shall be deemed to be incorporated herein.

(2) for the purpose of determining the extent of the Carrier's liability for loss of or damage to the Goods, the agreed value of the Goods is agreed to be the invoice value plus freight and insurance if paid.

(B) Combined Transport

Where the Carriage called for by this Bill of Lading is Combined Transport there, save as is otherwise provided in this Bill of Lading, the Carrier shall be liable for loss or damage occurring during Carriage to the extent and not below

(1) Where the stage of Carriage where loss or damage occurred is not known

(a) Subject to

Where the stage of Carriage where the loss or damage occurred is not known the Carrier shall be relieved of liability for any loss or damage if such loss or damage was caused by:

(i) an act or omission of the Merchant,

(ii) insufficiency of or defective condition of packing or marking,

(iii) handling, loading, stowage or unloading of the Goods by or on behalf of the Merchant,

(iv) inherent vice of the Goods,

(v) strike, lock-out, stoppage or restraint of labour the consequences of which the Carrier could not avoid by the exercise of reasonable diligence,

(vi) a matter beyond the the operation of a motive installation or a person acting for him in fable for any damage under an applicable international convention or national law governing liability in respect of nuclear energy,

(vii) any cause or event which the Carrier could not avoid and the consequences whereof he could not prevent by the exercise of reasonable diligence.

(b) Burden of Proof

The burden of proving that the loss or damage was due to one or more of the causes or events specified in this sub-clause (B) (1) shall rest upon the Carrier. Save that, when the Carrier establishes that in the circumstances of the case, the loss or damage could be attributed to one or more of the causes or events specified in sub-paragraphs (b) (iii), (iv) or (vi) above, it shall be presumed that it was so caused. The Merchant shall, however, be entitled to prove that the loss or damage was not, in fact, caused either wholly or partly by one or more of these causes or events.

(c) Amount of Compensation

(i) Compensation shall be calculated by reference to the value of such Goods at the place and time when they are delivered to the Merchant or at the place and time when they should have been delivered.

(ii) The value of the Goods shall be determined according to the current commodity exchange price or, if there is no such price, according to the current market price or, if there is no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

Compensation shall in no circumstances whatsoever and howsoever arising exceed US$2.00 per kilo of the gross weight of the goods lost or damaged, unless it is proved that the loss or damage resulted from an act or omission of the Carrier done with the intent to cause damage or recklessly and with the knowledge that damage would probably result.

(2) Where the stage of Carriage where loss or damage occurred is known

Notwithstanding anything provided for in sub-clauses (B) (1) above and subject to Clause 14 (Both Cargo and Livestock), where it is known during which stage of Carriage the loss or damage occurred the liability of the Carrier in respect of such loss or damage shall be determined

(a) by the provisions contained in any international convention or national law, which provisions –

(i) cannot be departed from by private contract to the detriment of the Merchant, and

(ii) would have applied if the Merchant had made a separate and direct contract with the Carrier in respect of the particular stage of Carriage where the loss or damage occurred and received as evidence thereof any particular document which must be issued in order to make such international convention or national law applicable;

Provided that an international convention or national law will determine the Carrier's liability as aforesaid only if it would have been applicable if the contract referred to in (ii) above were governed

(b) where the loss or damage occurred between the time that the Goods were consigned by the Carrier for Carriage and the time that the Goods were loaded at the port of loading, by the internal law of the state of the place of consignment, or

(c) where the loss or damage occurred during carriage by sea, by the internal law of the State of the final port of discharge, or

(d) where the loss or damage occurred between the time that the Goods were discharged at the final port of discharge and the time that the Goods were delivered to the Merchant, by the internal law of the State of the place of delivery, or

(e) where no international convention or national law would apply by virtue of (a) above, by the Hague Rules contained in the International Convention for the unification of certain rules relating to Bills of Lading dated 25th August, 1924, if the loss or damage is known to have occurred at sea or on inland waterways, or

(f) by the provisions of sub-clause (B) (1) in cases where the provisions of paragraphs (a) and (b) above do not apply.

Where under the provisions of this sub-clause (B) (2) the liability of the Carrier shall be determined by the provisions of any international convention or national law, the liability shall be determined as though the Carrier were the carrier referred to in any such convention or national law.

References in this sub-clause (B) (2) to the internal law of a State shall be construed to exclude all rules of private international law except that State's.

For the purposes of this sub-clause (B) (2) reference to the Hague Rules is hereby by was shall be deemed to include reference to carriage by inland waterways and the Hague Rules shall be considered accordingly.

(g) Notwithstanding the other provisions of clause 5(B) (2) where under this Bill of Lading either the place of acceptance or the place of delivery is an inland point in Canada or in the United States the responsibility of the Carrier with respect to the transportation inland in Canada or in the United States should be as follows:

(a) The Carrier shall procure transportation by carriers here or newly authorized by a competent authority to engage in transportation inland in Canada or in the United States. Such transportation should be subject to the inland Carriers contracts of carriage and tariffs. The Carrier guarantees the fulfilment of such inland carriers obligations under their contracts and tariffs.

(B) As to the services incident to transportation under (a) (A) the Carrier undertakes to procure such services as necessary. All such services will be subject to the usual conditions of persons providing the services. The Carrier guarantees fulfilment of the obligations of such persons under the contract concerned.

(3) Special Provisions for Combined Transport

(a) Notice of loss or damage

The Carrier shall be deemed prima facie to have delivered the Goods as described in this Bill of Lading unless notice of loss of, or damage to the Goods, indicating the general nature of such loss or damage, shall have been given in writing to the Carrier or to his representative at the place of delivery before or at the time of removal of the Goods into the custody of the person entitled to delivery thereof under this Bill of Lading, or if the loss or damage is not apparent, within seven consecutive days thereafter.

(b) Time-bar

Subject to any provision of this Clause 5 to the contrary the Carrier shall be discharged of all liability under this Bill of Lading unless suit is brought and notice thereof given to the Carrier within nine months after delivery of the Goods or the date when the Goods should have been delivered.

(C) General (applicable to both Port to Port Shipment and Combined Transport)

(1) Delay

The Carrier does not undertake that the Goods shall arrive at the port of discharge or place of delivery at any particular time or to meet any particular market or sale and save as provided in sub-clause (B) (2) above the Carrier shall in no circumstances be liable for direct, indirect or consequential loss or damage caused by delay.

Where under the provisions of (B) (2) above the Carrier is liable for delay, liability shall be limited to the amount of the freight applicable to the relevant stage of transport provided this is not contrary to the international convention or national law concerned.

(2) Deviation

The terms of this Bill of Lading shall govern the responsibility of the Carrier in connection with or arising out of the supply of a Container to the Merchant, whether supplied before or after the Goods are received by the Carrier for Carriage or delivered to the Merchant.

(3) Ad Valorem

Higher compensation may be claimed only when, with the consent of the Carrier the value of the Goods declared by the Shipper, which exceeds the limits laid down in this Clause, has been inserted in the box provided on the face of this Bill of Lading and extra freight paid. In that case the amount of the declared value shall be substituted for those limits. Any partial loss or damage shall be adjusted pro rata on the basis of such declared value.

(4) Hague Rules Limitation

Subject to (3) above, whenever Hague Rules are applicable, otherwise than by national law, in determining the liability of the Carrier, the liability shall in no event exceed £ 100 sterling per package or unit.

(5) Scope of Application

Save as otherwise provided herein, the Carrier shall in no circumstances whatsoever or howsoever arising be liable for direct or indirect or consequential loss or damage. The defences and limits of liability provided for in this Bill of Lading shall apply in any action against the Carrier for loss or damage or delay whether the action be founded in Contract or in Tort.

6. SHIPPER-PACKED CONTAINERS

If a Container has not been stowed by or on behalf of the Carrier –

(a) the Carrier shall not be liable for loss of or damage to the Goods caused by

(i) the manner in which the Container has been stowed, or

(ii) the unsuitability of the Goods for carriage in Containers, or

(iii) the unsuitability or defective condition of the Container provided that where the Container has been provided by or on behalf of the Carrier this paragraph (iii) shall only apply if the unsuitability or defective condition would not have been apparent upon reasonable inspection by the Merchant at or prior to the time when the Container was stowed,

(b) the Merchant shall indemnify the Carrier against any loss, damage, liability or expense (otherwise and howsoever arising) and any one or more of the matters referred to in sub-paragraphs (a) (i), (ii) or (iii) above. Save that in the loss, damage, liability or expense was caused by a matter referred to in paragraph (a) (iii) the Merchant shall not be liable to indemnify the Carrier in respect thereof unless both the provisos referred to in that paragraph apply.

7. INSPECTION OF GOODS

The Carrier or any person to whom the Carrier has sub-contracted the Carriage or any person authorized by the Carrier shall be entitled, but under no obligation, to open any Container or package at any time and to inspect the Goods.

8. CARRIAGE AFFECTED BY CONDITION OF GOODS

If it appears at any time that the Goods or any part thereof cannot safely or properly be carried or carried further, either at all or without incurring any additional expense or taking any measures in relation to the Container or the Goods or any part thereof, the Carrier may without notice to the Merchant take any measure(s) and/or incur any reasonable additional expense to carry or to continue the Carriage thereof, and/or abandon the Carriage and/or store the same ashore or afloat under cover or in the open, at any place, which abandonment or storage shall be deemed to constitute due delivery under this Bill of Lading. The Merchant shall indemnify the Carrier against any reasonable additional expense so incurred.

9. DESCRIPTION OF GOODS

(1) This Bill of Lading shall be prima facie evidence of the receipt by the Carrier in apparent good order and condition, except as otherwise noted, of the total number of Containers, packages or other units or weight of other cargoes specified on the face hereof. Proof to the contrary shall not be admissible when this Bill of Lading has been transferred to a third party acting in good faith.

(2) Except as provided in sub-clause 9 (1) above, no representation is made by the Carrier as to the weight, contents, measure, quantity, quality, description, condition, marks, numbers or value of Goods and the Carrier shall be under no responsibility whatsoever in respect of such description or particulars.

(3) If any particulars of any Letter of Credit and/or Import Licences and/or Sale Contract and/or Invoice or Order Number and/or details of any warrant to which the Carrier is not a party are inserted on the face of this Bill of Lading, such particulars are included solely at the request of the Merchant for the convenience of the Carrier. The Merchant agrees that the inclusion of such particulars shall not be regarded as a declaration of value and in no way affects the Carrier's liability under this Bill of Lading. The Merchant further agrees to indemnify the Carrier against all consequences of including such particulars in this Bill of Lading.

The Merchant acknowledges that, except when the provisions of sub-clause 9 (c) (3) apply, the value of the Goods is unknown to the Carrier.

10. SHIPPER'S RESPONSIBILITY

(1) The Shipper warrants to the Carrier that the particulars relating to the Goods as set out inserted have been checked by the Shipper on receipt of this Bill of Lading and that such particulars and any other particulars furnished by or on behalf of the Shipper are correct.

(2) The Shipper shall indemnify the Carrier against all loss, damage, fines and expenses arising or resulting from inaccuracies in or inadequacy of such particulars or from any other cause in connection with the Goods for which the Carrier is not responsible.

11. FREIGHT AND CHARGES

(1) Freight shall be deemed fully earned on receipt of the Goods by the Carrier and shall be paid and non-returnable in any event.

(2) The Merchant's attention is drawn to the stipulations concerning currency in which the Freight is to be paid, rate of exchange, devaluation and other contingencies relative to Freight in the applicable Tariff.

(3) The Freight has been calculated on the basis of particulars furnished by or on behalf of the Shipper. The Carrier may at any time upon any Container or other package or unit in order to exercise, amendment or revision the contents, and if the particulars furnished by or on behalf of the Shipper are incorrect, it is agreed that a sum equal to either five times the difference between the correct Freight and the Freight charged or to double the correct Freight less the Freight charged, whichever sum is the smaller, shall be payable as liquidated damages to the Carrier.

(4) Except as may be prescribed to the contrary in the applicable Tariff all unpaid charges shall be paid without any set-off, counterclaim or deduction of any description.

(5) Freight and liquidated damages under sub-clauses 11 (3) above may be recovered by the Carrier from any person falling within the definition of Merchant in Clause 1 whether or not such person is the Shipper.

12. LIEN

The Carrier shall have a lien on the Goods and any documents relating thereto for all sums payable to the Carrier under this contract and any other contract for general average contribution, and for the costs of recovering the same, and for that purpose shall have the right to sell the Goods by public auction or private treaty without notice to the Merchant. The Merchant shall indemnify the carrier against all and any extra costs incurred for any reason whatsoever.

13. OPTIONAL STOWAGE

(1) The Goods may be stowed in pump, forecastle, deck house, shelter deck, passenger spaces, lumber spaces or any enclosed or open commonly used in the trade for the carriage of goods.

(2) The Goods may be stowed by the Carrier in Containers.

(3) Goods stowed in Containers whether by the Carrier or the Merchant may be carried on deck or under deck without notice to the Merchant. Such Goods (other than livestock) whether carried on deck or under deck shall participate in general average and shall be delivered as fire within the definition of Goods in the Hague Rules or Hague Visby Rules or where the Hague Visby Rules would be applicable to the Carriage under the provisions of Clause 5 (Carrier's Responsibility) hereof, for the purposes of the Hague Visby Rules).

14. DECK CARGO AND LIVESTOCK

(1) Goods (not being Goods stowed in Containers) which are stated herein to be carried on deck and livestock, whether or not carried on deck, are carried without responsibility on the part of the Carrier for loss or damage of whatsoever nature arising during Carriage by any whether caused by unseaworthiness or negligence or any other cause whatsoever.

(2) Livestock are carried at the sole risk of the Merchant. The Carrier shall be under no liability whatsoever for any injury, illness, death, delay or deterioration howsoever arising even though caused or contributed to by the act, neglect or default of the Carrier or by the unseaworthiness or unfitness of any vessel, craft, conveyance, Container or other place utilizing at any time in the event of the Master, in his sole discretion, considering that any livestock is likely to be injurious to the health of any other livestock or of any person on board or to cause loss except to be released or interested in the prosecution of the voyage such livestock may be destroyed and thrown overboard without any liability attaching to the Carrier. The Merchant shall indemnify the Carrier against all and any extra costs incurred for any reason whatsoever in connection with the carriage of such livestock.

15. METHODS AND ROUTE OF TRANSPORTATION

(1) The Carrier may at any time and without notice to the Merchant:–

(a) use any means of transport or storage whatsoever;

(b) transfer the Goods from one conveyance to another including transhipping or carrying the same on another vessel than that named on the face hereof or by any other means of transport whatsoever;

(c) unstack and remove Goods which have been stowed into a Container and forward the same in a Container or otherwise;

(d) proceed by any route in his discretion (whether or not the nearest or most direct or customary or advertised route) and proceed to or stay at any place or port whatsoever once or more often and in any order;

(e) load or unload the Goods at any place or port (whether or not any such port is named overleaf as the Port of Loading or Port of Discharge) and store the Goods at any such place or port;

(f) comply with any orders or recommendations given by any government or authority or any person or body acting or purporting to act on or on behalf of such government or authority or having under the terms of the insurance on the conveyance employed by the Carrier the right to give orders or directions;

(g) carry the Goods on deck or under deck.

(2) The liberties set out in sub-clause (1) may be invoked by the Carrier for any purpose whatsoever whether or not connected with the Carriage of the Goods including undergoing repairs, towing or being towed, adjusting instruments, dry docking and assisting vessels in all situations. Anything done in accordance with sub-clause (1) or any delay arising therefrom shall be deemed to be within the contractual carriage and shall not be a deviation.

(3) By tendering Goods for Carriage without any written request for Carriage in a specialized Container or for Carriage otherwise than in a Container the Merchant accepts that the Carriage may presently be undertaken in a general purposes Container

16. MATTERS AFFECTING PERFORMANCE

If at any time the Carriage is or is likely to be affected by any hindrance, risk, delay, difficulty or disadvantage of any kind (other than the inability of the Goods or any part thereof safely or properly to be carried or carried further) and howsoever arising (even though the circumstances giving rise to such hindrance, risk, delay, difficulty or disadvantage existed when such Carriage was entered into or the Goods were accepted for Carriage) and which cannot be avoided by the exercise of reasonable endeavours the Carrier (whether or not the Carriage is commenced) may either –

(a) without notice to the Merchant abandon the Carriage of the Goods and place the Goods or any part of them at the Merchant's disposal at any place or port which the Carrier may deem safe and convenient, whereupon the responsibility of the Carrier in respect of such Goods shall cease. The Carrier shall nevertheless be entitled to full Freight on Goods received for Carriage, and the Merchant shall pay any additional costs of Carriage to and delivery and storage at such place or port, or

(b) without prejudice to the Carrier's right subsequently to abandon the Carriage under (a), upon notice to the Merchant suspend Carriage of the Goods or any part of them and store them before or afloat upon the terms of this Bill of Lading, against payment of such reasonable additional charges as the Carrier may determine. The Carrier undertakes to take forward forthwith the terminated Goods, the Carriage of which has been suspended, as soon as possible after the cause of hindrance, risk, delay, difficulty or disadvantage has been removed but makes no representations as to the maximum period between such removal and the forwarding of the Goods to the Place of Delivery named in the Bill of Lading.

17. DANGEROUS GOODS

(1) No goods which are or may become dangerous, inflammable or damaging (including radio-active materials), or which are or may become liable to damage any property whatsoever, shall be tendered to the Carrier for Carriage without the express consent in writing and without the Container or other covering in which the goods are to be transported and the goods being distinctly marked on the outside so as to indicate the nature and character of any such articles and so as to comply with any applicable laws, regulations or orders in relation thereto. If any such articles are delivered to the Carrier without such consent and marking or if in the opinion of the Carrier the articles are or are liable to become of a dangerous, inflammable or damaging nature they may at any time be destroyed, disposed of, abandoned, or rendered harmless without compensation to the Merchant and without prejudice to the Carrier's right to Freight.

(2) The Merchant undertakes that the Goods are packed in a manner adequate to withstand the ordinary risks of Carriage having regard to their nature and in compliance with all laws or regulations which may be applicable during Carriage.

(3) Whether or not the Merchant was aware of the nature of the goods the Merchant shall indemnify the Carrier against all claims, losses, damages or expenses arising in consequence of any breach of the provisions of this Clause.

(4) Nothing contained in this Clause shall deprive the Carrier of any of his rights otherwise provided for.

18. REGULATIONS RELATING TO GOODS

The Merchant shall comply with all regulations or requirements of customs, port and other authorities, and shall bear and pay all duties, taxes, fines, imposts, expenses or losses incurred or suffered by reason thereof or by reason of any illegal, incorrect or insufficient marking, numbering or addressing of the Goods, and shall indemnify the Carrier in respect thereof.

19. NOTIFICATION AND RELEASE

(1) Any mention herein of parties to be notified of the arrival of the Goods is solely for information of the Carrier, and failure to give such notification shall not involve the Carrier in any liability nor relieve the Merchant of any obligation hereunder.

(2) Where the Carriage called for by this Bill of Lading is a Port to Port Shipment the Carrier shall be at liberty to discharge the Goods or any part thereof without notice whereby they come in hand at or on to any wharf, craft or place on any day and at any time, whereupon the liability of the Carrier (if any) in respect of the Goods or that part thereof discharged as aforesaid shall wholly cease notwithstanding any custom or the part to the contrary and notwithstanding that any charges, dues or other expenses may be or become payable. If such are paid, either then or the request of the Merchant, in circumstances where the Goods or that part thereof are discharged could have been discharged ashore without additional delay, the Goods or that part thereof, as the case may be, shall nevertheless still be deemed to be discharged for the purposes of this Clause and of Clause 5 until they are discharged from such craft. The Merchant shall upon delivery of the Goods, upon discharge. All expenses incurred by reason of the Merchant's failure to take delivery of the Goods as aforesaid shall be for the Merchant's account.

(3) Where the Carriage called for by this Bill of Lading is Combined Transport, the Merchant shall take delivery of the Goods within the time provided for in the Carrier's applicable Tariff (see Clause5).

(4) If delivery of the Goods or any part thereof is not taken by the Merchant at the time and place when and where the Carrier is entitled to call upon the Merchant to take delivery thereof, whether the carriage called for by this Bill of Lading is a Port to Port Shipment or Combined Transport, the Carrier shall be entitled without notice to endorse the Goods or that part thereof if stowed in Containers and/or to store the Goods or that part thereof ashore, afloat, in the open or under cover at the sole risk of the Merchant. Such storage shall constitute due delivery hereunder, and thereupon all liability of the Carrier in respect of the Goods or that part thereof stored as aforesaid shall cease and a storage charge shall wholly accrue and be paid at rates current from time to time. The Carrier or any agent or sub-contractor of the Carrier's shall forthwith upon demand be paid by the Merchant to the Carrier.

(5) If the Merchant fails to take delivery of the Goods within thirty days of its becoming due under sub-clauses (2) or (3) above or if in the opinion of the Carrier they are likely to deteriorate, decay, become worthless or incur charges whether for storage or otherwise in excess of their value, and whether the Carriage is a Port to Port Shipment or Combined Transport, the Carrier may, without prejudice to any other rights which he may have against the Merchant, without notice and without any responsibility whatsoever attaching to him, sell or dispose of the Goods and apply the proceeds of sale in reduction of the sums due to the Carrier from the Merchant in respect of this Bill of Lading.

20. BOTH-TO-BLAME COLLISION

If the carrying ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default in the navigation of the management of the carrying ship, the Merchant undertakes to pay the Carrier, or where the Carrier is not the owner of or entitled to the possession of the carrying ship, to pay to the Carrier as trustee for the owner and/or demise charterer of the carrying ship, such sum as the Merchant is indemnify the Carrier and/or the owner and/or demise charterer of the carrying ship against all loss or liability to the other or non-carrying ship or her owners insofar as such loss or liability represents loss of or damage to, any claim whatsoever of the Merchant, paid or payable by the other or non-carrying ship or her owners to the Merchant and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or her owner or demise charterer or the Carrier. The foregoing provisions shall also apply where the owners, operators, or those in charge of any ship or ships or objects, other than, or in addition to the colliding ships or objects, are at fault in respect to a collision, contact, stranding or other accident.

21. GENERAL AVERAGE

General average shall be adjusted according to the York Antwerp Rules, 1974, as amended 1990, at any port or place at the option of the Carrier whether declared by the Carrier or a sub-contractor of the Carrier. The Merchant shall give such cash deposit or other security as the Carrier may deem sufficient to cover the estimated general average contribution of the Goods and any salvage and special charges thereon, before delivery of the Goods. Delivery of the Goods whether or not after the time of delivery the Merchant had notice of the Carrier's lien. The Carrier shall be under no obligation to exercise any lien for general average contribution due to the Merchant.

In the event of accident, danger, damage or disaster before or after the commencement of the voyage resulting from any cause whatsoever whether due to negligence or not, for which or for the consequence of which, the carrier is not responsible by statute, contract or otherwise, the goods shippers, consignees or owners of the goods shall contribute with the carrier in General Average to the payment of any sacrifices, losses or expenses of a General Average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the goods.

If a adjusting consent is owned or operated by the Carrier, salvage shall be paid for as fully as if said salvage was owned or operated by strangers.

Such deposit as the Carrier may require may be applied to cover the estimated contribution of the goods and any salvage or special charges thereon shall, if required, be made by the goods, shippers, consignees or owners of the goods to the Carriers before delivery.

22. VARIATION OF THE CONTRACT, ETC.

No servant or agent of the Carrier shall have power to waive or vary any of the terms hereof unless such waiver or variation is in writing and is specifically authorised or ratified in writing by the Carrier.

23. LAW AND JURISDICTION

Disputes arising under this Bill of Lading shall be determined at the option of the Merchant either by the U.S. District Court for the Southern District of New York in accordance with the laws of the U.S.A. or by Canadian Courts in accordance with the laws of Canada or by Courts of Australia in accordance with Australian law or by the Courts of New Zealand in accordance with the laws of New Zealand. If anything in this Bill of Lading is inconsistent with or repugnant to the laws stipulated in this Bill of Lading it shall only be null and void to the extent of such inconsistency or repugnance.

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MAY 2 8 2004

No. 02-1028

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

JAMES N. KIRBY PTY LTD., DBA KIRBY ENGINEERING, AND ALLIANZ AUSTRALIA LIMITED,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC. IN SUPPORT OF RESPONDENTS

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May 28, 2004

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INTEREST OF AMICUS

Public Citizen, Inc. is a public advocacy, lobbying, and litigating organization with approximately 160,000 members nationwide. It has a longstanding interest in limiting the reach of the federal preemption doctrine to situations in which Congress has made clear its intent to oust state law in order to serve important federal objectives. Of particular relevance here, Public Citizen's lawyers have been counsel for parties and amici before this Court in cases that posed the question whether federal law preempts state-law judicial remedies intended to compensate those harmed by tortious conduct. *See, e.g. Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). In each instance, they argued that, under this Court's Supremacy Clause precedents, the requisite Congressional intent to preempt tort remedies was not present.[1]

Although Public Citizen does not have a strong interest in the maritime law issues that form the principal dispute among the parties, it does have a strong interest in, and strenuous objection to, the federal preemption theory advanced at pages 21-26 of the amicus brief filed by the United States. Therefore, this amicus brief is solely addressed to the argument advanced by the United States. As explained below, the government's theory cannot be squared with this Court's precedents, which demand, at the least, that preemption be

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[1]In blanket letters of consent filed with the Clerk, the parties have consented to the filing of amicus briefs in this case. Pursuant to this Court's Rule 37.6, amicus states that this brief was not authored in whole or in part by counsel for a party and that no one other than amicus made a monetary contribution to the preparation or submission of this brief.

based on a clear federal policy expressed by Congress through the text of federal law or by a federal agency acting pursuant to an appropriate Congressional delegation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Public Citizen is concerned about the implications of the Solicitor General's preemption argument in this case because it is based neither on express provisions of federal law nor on the structure of a federal statute meant to govern the conduct of a regulated entity. Rather, the government's argument is based on a supposed federal policy of "non-discrimination" between rates charged to shippers who deliver their own goods and those, like freight forwarders, who carry consolidated shipments belonging to various owners. However, as explained in greater detail below, the government is unable to tether this theory to any federal statute or regulation that seeks to govern the conduct of petitioner Norfolk Southern at issue in this suit. This Court has never countenanced the ouster of state law with so little evidence of Congressional intent to do so, and it should not do so here.

ARGUMENT

THE UNITED STATES' PREEMPTION THEORY SHOULD BE REJECTED AS WHOLLY AT ODDS WITH THE COURT'S SUPREMACY CLAUSE JURISPRUDENCE

1. The federal preemption doctrine has its origin in the Supremacy Clause, Article VI, Clause 2 of the Constitution, which provides the basic authority for the proposition that conflicts between federal and state law must be resolved in favor of federal law. *See McCulloch v. Maryland*, 4 Wheat. 316, 427, 4 L.Ed. 579 (1819); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Preemption is said to be "express"

if a federal statute explicitly addresses the domain of state law that is or is not preempted, and is "implied" if the structure and purpose of federal law, but not its actual words, preempt state law. *Id.*

The Supremacy Clause is restricted by other constitutional principles implicit and explicit in the constitutional plan, most prominently in the Tenth Amendment that provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In light of this constitutional imperative of federalism, a party seeking preemption of state law bears a heavy burden. There is a strong presumption against preemption that may be overcome only by "clear and manifest" congressional intent to the contrary. *See, e.g., Medtronic*, 518 U.S. at 485; *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994); *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605, 611 (1991); *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985).

Thus, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Put differently, "[p]reemption of state law by federal . . . regulation is not favored 'in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.'" *Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)).

The foregoing precepts are not mere precedential idiosyncrasies, but are deeply embedded in the "federal-state balance" that was fundamental to the constitutional plan.

Hillsborough County, 471 U.S. at 717; *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Thus, the Court's Supremacy Clause jurisprudence is "an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). And, it makes perfect sense to implement these principles of federalism through a presumption against preemption, since, under the Supremacy Clause, Congress retains the power to preempt when it so chooses, and it need only speak clearly to manifest its preemptive intent. Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U.L. Rev. 559, 627 (1997); *see also Jones*, 430 U.S. at 525 (presumption against preemption "provides assurance that the 'federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts") (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

2. In light of these basic principles, "there is no federal pre-emption *in vacuo*, without a congressional text or a federal statute to assert it." *Puerto Rico Dept. of Consumer Affairs v. ISLA Petroleum Corp.*, 485 U.S. 495, 503 (1988). Rather, the Court must determine whether a federal statutory scheme manifestly withdraws the remedies that ordinarily would be available to someone who, like respondent Kirby, can show that a railroad bears responsibility for damaging its good in domestic transit. Cases subsequent to this Court's ruling in *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959), involving the construction of Himalaya clauses, assume that if the Himalaya clause does not apply to the plaintiff's claims (*i.e.*, it does not benefit the alleged tortfeasor), the plaintiff can sue in tort for full damages. *See, e.g., Caterpillar Overseas, S.A. v. Marine Transp., Inc.*, 900 F.2d 714, 725-26 (4th Cir. 1990); *De Laval Turbine, Inc. v. West India Indus., Inc.*, 502 F.2d 259, 267 (3d Cir. 1974). Of course, in some instances, the relevant tort would be a *maritime* tort,

but that is not the case here, where the conduct at issue occurred entirely inland, and thus state common law applies. *See, e.g., Coleman Co., Inc. v. Compagnie Generale Maritime*, 903 F. Supp. 45, 48 (S.D. Ga. 1995). In any event, claiming that a tort remedy — state-law-based or otherwise — is overridden by a privately-bargained contract provision is a far cry from claiming that, even if it is not overridden by contract, the tort remedy is eviscerated by external principles of federal law. Indeed, the very fact that none of the many cases examining the breadth of Himalaya clauses address, let alone find persuasive, claims of federal preemption — and the Solicitor General cites none — underscores the unprecedented character of the government's preemption argument.

3. No express preemption provision is involved here, such as those that Congress has enacted specifically to target state law, and the federal statute or a federal agency has set the relevant standard of care governing the defendant's conduct. *See, e.g., Cipollone*, 505 U.S. at 524-30. The government cites no federal statute that eliminates or limits state tort remedies for the owner of goods damaged or destroyed in domestic transit by a domestic rail carrier operating under a private rail contract, as is the case here.

4. State law may be impliedly preempted in two basic ways. First, when Congress occupies a field so pervasively that no room is left for state regulation, state law is impliedly preempted. *Rice*, 331 U.S. at 230. "Comprehensive" federal regulation, however, is not itself sufficient to preempt state law. *Hillsborough County*, 471 U.S. at 718; *Medtronic*, 518 U.S. at 507 (Breyer, J., concurring in part and concurring in the judgment). Rather, the text and structure of the federal legislation must itself clearly evince Congress's intent to occupy the entire field. Thus, for example, even the extensive federal regulation of medical devices, pesticides, or even nuclear safety is not sufficient to impliedly preempt all state

law in those areas. *See Medtronic*, 518 U.S. 470 (medical devices); *Mortier,* 501 U.S. 595 (pesticides); *Silkwood v. Kerr-McGee,* 464 U.S. 238 (1984) (nuclear safety). The United States does not claim field preemption here, nor could it. Congress has given no indication that it intended that the liability regime for losses that occur at sea should apply to a tort arising from the land-based portion of a multimodal shipment.

The instances in which the Court has found field preemption in the maritime area serve to underscore the differences between a Congressional directive that eliminates all forms of state regulation and the situation here. In *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), the Court considered whether various aspects of a Washington state law governing oil tankers in Puget Sound (the "Tanker Law") was preempted by the Ports and Waterways Safety Act of 1972 ("PWSA") and various Coast Guard regulations promulgated thereunder. *Ray* held that specific design requirements imposed by the Tanker Law were preempted by Title II of the PWSA, which occupied the entire field of state law in this area. *Id.* at 168. Because Title II obligated the Coast Guard to promulgate rules regarding all aspects of tanker design and operation, the statute "le[ft] no room for the States to impose different or stricter design requirements than those which Congress has enacted...." *Id.* By contrast, *Ray* held that Title I of the PWSA, which *permitted*, but did not obligate, the Coast Guard to issue various rules to control vessel traffic did not preempt Washington state's tug-escort rules, because the Coast Guard had yet to promulgate conflicting rules on that same topic. *Id.* at 168-72; *see also United States v. Locke*, 529 U.S. 89, 103-113 (2000) (reaffirming both parts of *Ray* analysis). Here, Congress has not directed any federal agency to require any national rules limiting or allocating liability among potentially responsible parties concerning cargo losses incurred during the inland portion of multimodal shipments, and the government

does not contend otherwise. Therefore, there is no implied field preemption.

5. The second category of implied preemption is often referred to as "conflict" preemption. The Court has recognized conflicts where compliance with both federal and state law is physically impossible, *Florida Lime & Avocado Growers*, 373 U.S. at 142-43, and where state law stands as an obstacle to the accomplishment of federal legislative or regulatory objectives. *See, e.g., Hillsborough County*, 471 U.S. at 713; *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). There is, of course, no preemption based on "impossibility" here, because it cannot be claimed that by compensating Kirby in tort, Norfolk Southern would therefore be precluded from taking some action demanded by a competing regulatory or common-law regime (and here there is no such regime).

That leaves the question whether imposing tort liability on Norfolk Southern for its negligence in causing the destruction of Kirby's goods would somehow stand as an obstacle to the attainment of federal objectives. Not surprisingly, in this Court's cases, such objectives are discerned by looking to federal statutes or to regulations issued by a federal agency pursuant to a valid Congressional authorization. *Cipollone*, 505 U.S. at 516; *Hillsborough County*, 471 U.S. at 714-22. And, as noted, even then, "comprehensive" federal regulation alone is not sufficient. *Id.* at 718. Rather, the Court has consistently rejected the eradication of state law on the basis of general federal participation in the regulatory field and has "look[ed] for special features warranting preemption." *Id.* at 719.

Here, such "special features" would require, at the least, some federal statute or regulation evincing a particular concern about the liability regime for inland carriers, such as Norfolk Southern, in multimodal shipping. There is none. *Indeed, there*

is no statute applicable to the inland portion of the transaction, let alone one concerned with the liability rules that would govern the Kirby-Norfolk Southern relationship. As the Solicitor General acknowledges (U.S. Br. 5), the Carriage of Goods by Sea Act ("COGSA"), 46 App. U.S.C. § 1300 *et seq.*, does not apply of its own force, because the loss at issue here occurred inland and not "from the time when the goods [were] loaded on to the time when they [were] discharged from the ship." 46 App. U.S.C. § 1301(e). To be sure, Norfolk Southern maintains that COGSA principles applicable to the Hamburg Sud bill of lading also apply to the relationship between Kirby and Norfolk Southern, a proposition that Kirby, of course, vehemently disputes. But even if that were true, COGSA would apply to Kirby only as a matter of contract and not of its own force. *Cf.* U.S. Br. 5-6 (noting that COGSA does not preclude shipper and carrier from agreeing to liability limits for losses that occur before loading and after discharge from ship); *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 (1995). In sum, the preemption argument advanced by the government appears to be completely theoretical and not tied at all to the "circumstances of [this] particular case." *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000) (quoting *Hines*, 312 U.S. at 67); *cf. Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) ("The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute.").

Without a statutory or regulatory hook for its preemption argument, the government relies on an elaborate description of a policy against charging different rates to "shippers who deliver their own property than to shippers, such as freight forwarders, who consolidate goods belonging to various owners." U.S. Br. 24 (citation omitted). The government maintains that this common-law non-discrimination policy, carried over to maritime commerce in the Shipping Act, would be subverted because "cargo owners who

deal directly with Hamburg Sud would be bound by the liability limit in Hamburg Sud's bill of lading, while cargo owners who ship through an intermediary are not...." U.S. Br. 25. But that theory depends not only on the government's assertion that providing one shipper a higher liability limit than another "would likely" violate the Shipping Act, *id.*, but, more fundamentally, on the notion that this antiquated, anti-competitive "non-discrimination" principle has been carried over to rail carriage. It has not. In fact, the government acknowledges that Congress has effectively *deregulated* rail carriage. *See* U.S. Br. 25 n.9. To say, as does the government, that "the statutory ban on unreasonable discrimination remains in force," *id.* (citing 49 U.S.C. § 10741(a)), is not meaningful, because that provision does not apply when rail carriers privately contract with shippers (as occurred here between Columbus Line USA and Norfolk Southern). *See* 49 U.S.C. §§ 10709, 10741(b)(1); *see* U.S. Cert. Stage Br. 12 ("we are advised by petitioner that the rail transport in this case was provided as contract carriage under 49 U.S.C. 10709, which would make the transport exempt from the Carmack Amendment's liability rules"). For all practical purposes, then, the non-discrimination "policy" as it affects rail carriage only exists for those who choose to be bound by it; in other words, it is no policy at all. There is thus *no* statutory or regulatory basis for the preemption claim here.

6. The government cites only one of this Court's preemption precedents, *Geier*, 529 U.S. 861, an implied protection case that is a world apart from the situation here. In *Geier*, the plaintiff sought damages under state law on the theory that her injuries in a car crash were caused by the defendant auto manufacturer's failure to install an airbag. The Court held that the suit was preempted by a federal regulation, promulgated pursuant to statute, that required cars to have passive restraint devices, but allowed manufacturers to choose among various restraint options including, but not limited to,

airbags. The Court reviewed in great detail the history of the relevant regulation, and concluded that a state-law damages action premised on a manufacturer's duty to have installed an airbag was impliedly preempted by a rule that rejected mandatory airbags in all cars and allowed manufacturers to protect occupants by other means. *Id.* at 874-83. There is nothing remotely similar to that situation here, where no one points to a federal statute or regulation that sets Norfolk Southern's standard of care in the carriage of Kirby's goods, let alone a standard of care that would be in conflict with the tort duty applicable in Kirby's state-law action. Moreover, as noted above, no federal statute addresses the liability rules for the inland rail carriage at issue.

CONCLUSION

For the reasons stated above, the Court should reject the preemption argument advanced by the United States.

Respectfully submitted,

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IN THE

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NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

JAMES N. KIRBY PTY LIMITED d/b/a KIRBY ENGINEERING and ALLIANZ AUSTRALIA LIMITED,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF JAN RAMBERG AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

This brief discusses the first question presented:

Whether a cargo owner that contracts with a freight-forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with carriers to provide that transportation.

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INTEREST OF *AMICUS CURIAE*

Jan Ramberg respectfully submits this brief as *amicus curiae*, pursuant to Rule 37 of the Rules of this Court.[1]

Jan Ramberg is professor emeritus of the Law Faculty of the University of Stockholm where, before his retirement, he held the position of Dean. He also is an honorary professor of Riga Graduate School of Law where, after having established the law school according to a treaty between the Swedish and Latvian governments, he served as Rector from 1998 to 2001. He is an honorary vice president of the Comité Maritime International ("CMI") and an honorary member of the International Federation of Freight Forwarders Associations ("FIATA"). Currently, he serves as the vice president of the Commission on Law and Practice of the International Chamber of Commerce ("ICC"). Previously, he chaired the Working Group established by the United Nations Conference on Trade and Development ("UNCTAD") and by the ICC in order to prepare the 1992 UNCTAD/ICC Rules for Multimodal Transport Documents (ICC pub. 481)—which is the only international regime applicable to multimodal transport and which formed the basis of the 1992 version of the Negotiable FIATA Multimodal Transport Bill of Lading ("FBL")—the bill of lading used in the present case.

Professor Ramberg is the author of several books within the field of transportation law, including INTERNATIONAL COMMERCIAL TRANSACTIONS (2000), GUIDE TO INCOTERMS 2000 (2000) (ICC pub. 620), and THE LAW OF FREIGHT FORWARDING (2002), which is an updated version of his original THE LAW OF FREIGHT FORWARDING AND THE 1992 FIATA MULTIMODAL TRANSPORT BILL OF LADING (1993), which was cited by the court of appeals below. Professor Ramberg also is the author of numerous articles in law journals worldwide. His contributions appear in his native Swedish, and also in English, French, Arabic, Chinese, Russian, and Spanish, among other languages.

For the present case, it is particularly important to note that Professor Ramberg served as the chairman of FIATA's Combined Transport Committee. In that capacity he drafted, in 1971, the first version of the FIATA Combined Transport Bill of Lading, as the FBL was then called. The 1971 FBL was revised in 1992 and is known as the Negotiable FIATA Multimodal Transport Bill of Lading. It is the 1992 version of the FBL that was used in this case. FIATA published Professor Ramberg's THE LAW OF FREIGHT FORWARDING AND THE 1992 FIATA MULTIMODAL TRANSPORT BILL OF LADING (1993) and his THE LAW OF FREIGHT FORWARDING (2002) as authoritative explanations of the 1992 FBL. The earlier work has been cited as authority on the construction of the FBL in this case by the court below,[2] the petitioner,[3] the respondents,[4] and the Government.[5]

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1. No counsel for a party authored this brief in whole or in part. No person or entity other than the *amicus curiae* or his counsel made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of the parties, reflected in letters on file with the Clerk.

2. *See* Pet. App. 8a-9a, 17a.

3. *See* Petition at 6, 8, 28; Brief of Petitioner at 13, 14, 44, 47.

4. *See* Respondents' brief and reply brief in the court of appeals.

5. *See* Brief of Solicitor General as *Amicus Curiae* at 17, 28.

Professor Ramberg has spent a professional lifetime working to establish the international use of the FBL and the UNCTAD/ICC Rules, with the view of ensuring that the FBL functions as a standard form document and is interpreted in the same way wherever it is used. He therefore would deplore any decision by a court of repute, and in particular by the Supreme Court of the United States, holding that the FBL fails in its purpose of providing a uniform means of establishing the issuer as a *carrier* instead of an *agent* of the shipper. Because such a holding could result in discrepant interpretations of the FBL in the country of origin and the country of destination, as Norfolk Southern urges here, the petitioner's position would represent a backward step and result in considerable confusion in international commerce, both in claims settlements and in financing goods under documentary credits.

SUMMARY OF ARGUMENT

The FBL form bill of lading used in this transaction was designed to create a shipper-carrier relationship, not an agency relationship. This conclusion is demonstrated by the terms of the FBL, explained by the history of the form, and justified by the choice given to the parties to structure their transaction in the manner that will best serve their commercial needs. If the parties wish to create an agency relationship, FIATA publishes other standard forms that would accommodate this need.

I. The term "Freight Forwarder" has different meanings depending on the intent of the parties as reflected in their decision to use either the FIATA FBL or FCT. When the parties decide the freight forwarder will use the latter, it acts as the shipper's agent. The choice to use the FBL on the other

hand demonstrates the freight forwarder's intent to act as a carrier and to undertake the corresponding carrier rights and responsibilities. FIATA does not use different terminology to distinguish between a traditional freight forwarder and the N.V.O.C.C. as described in U.S. law. However, international law recognizes the distinction in contrasting functions and liabilities of agents and carriers as is reflected in the FCT as compared to the FBL.

II. Prior to FIATA, there was confusion in some cases among various countries' national laws concerning the status and liability of a freight forwarder as either agent or principal. In order to avoid accepting carrier liability where freight forwarders did not expressly agree to do so, attempts were made to develop an international regime to address legal inconsistencies in dealing with the status of the freight forwarder. This culminated in the members of FIATA drafting the freight forwarder's bill of lading form; laying the groundwork for negotiability of freight forwarder bills of lading.

III. The FBL clarified the freight forwarder's liability when it acts as carrier. As a result, international banks and insurance carriers regard the FBL in the same manner as any other negotiable bill of lading issued by a vessel owner or operator. By affording the parties the choice of whether the freight forwarder will act as agent or carrier, the FBL promotes international uniformity and facilitates commercial transactions using these documents.

IV. The FBL resolves the issue of determining which liability regime will apply to multi-modal transport by adopting the "network principle" which permits the parties to establish which international convention or national law will apply depending upon where the loss occurs during the transportation.

ARGUMENT

I. "Freight Forwarder": A Carrier under an FBL; an Agent under an FCT

It is important to identify precisely what is at issue in this case. The petitioner asks this Court, in effect, to reform a contract to which the petitioner was not a party. The petitioner asks this Court to declare that the parties to the contract do not stand in relation as shipper and carrier, but rather as principal and agent.

This brief argues that the FBL form bill of lading used by the parties is designed to create a shipper-carrier relationship, not an agency relationship, and that establishment of a carrier relationship does not confer authority on the carrier to bind the shipper to any subsequent contracts entered into between the forwarder as carrier and any other party.[6] This form bill, promulgated by the International Federation of Freight Forwarders Associations ("FIATA"), is intended to allow freight forwarders who issue it to create a carrier relationship with their shippers. Although the FBL form (original, 1971; revised, 1992) has been used

6. This brief addresses only the *agency* issue expressed in question 1. Professor Ramberg agrees with the court of appeals' determination that the Himalaya Clause in the FBL was intended to protect only those parties that had contracted with the Freight Forwarder that issued the FBL, and therefore the court of appeals was correct to reject Norfolk Southern's argument that it was a protected party within the terms of the FBL. That question, however, is simply a matter of drafting; different bills of lading will contain different Himalaya Clauses. Because question 2 does not go to the very core of the FBL's essential purpose of designating the issuing freight forwarder as a carrier, not an agent, in relation to the shipper, Professor Ramberg limits his argument in this brief to question 1.

worldwide with great success for more than three decades, it does not suit the petitioner that the FBL should be interpreted by the U.S. courts as written or as intended. Instead, petitioner urges this Court to interpret the FBL as embodying an agency agreement between the shipper and the issuing freight forwarder, and as rendering the shipper on the FBL bound to other carriers, particularly the ocean carrier with whom the freight forwarder subcontracted for the ocean transportation and perhaps even the rail carrier with whom the ocean carrier's agent subcontracted for inland transportation.

In this case, an Australian shipper contracted with an Australian freight forwarder to deliver ten container loads of goods from Sydney to Huntsville, Alabama. Their contract was memorialized on a FIATA form FBL. Under the FBL, the Australian freight forwarder assumed carrier responsibility for the goods from Sydney to Huntsville. The FBL fixed the relationship of the parties as one between shipper and carrier. The parties did not intend, and the FBL does not reflect, that the freight forwarder would act as the shipper's agent in booking transportation from Sydney to Huntsville. Citation of a few clauses of the FBL will demonstrate that the parties to the FBL have created a shipper-*carrier* (as opposed to an *agency*) relationship.

The Definitions section of the FBL defines "Freight Forwarder" as "the Multimodal Transport Operator who issues this FBL and is named on the face of it and assumes liability for the multimodal transport contract as a *carrier*." *See* Standard Conditions (1992) governing the FIATA MULTIMODAL TRANSPORT BILL OF LADING, first paragraph (unnumbered).

Clause 2, entitled "Issuance of this FBL," provides the following:

> 2.1 By issuance of this FBL, the Freight Forwarder
>
> (a) undertakes to perform and/or in his own name to procure the performance of the entire transport, from the place at which the goods are taken in charge (place of receipt evidenced in this FBL) to the place of delivery designated in this FBL;
>
> (b) assumes liability as set out in these conditions.
>
> 2.2 Subject to the Conditions of this FBL the Freight Forwarder shall be responsible for the acts and omissions of his servants or agents acting within the scope of their employment, or any other person of whose services he makes use for the performance of the contract evidenced by this FBL, as if such acts and omissions were his own.

Standard Conditions (1992) governing the FIATA MULTIMODAL TRANSPORT BILL OF LADING, cl. 2.1, 2.2. Nothing in the FBL confers any authority on the forwarder to act on the shipper's behalf, to bind the shipper to any subsequent contracts entered into by the forwarder, or to agree to subsequent terms of carriage that might be inimical to the shipper's interests.

In addition to the FBL, FIATA also provides its members with the option of issuing a Forwarders Certificate of Transport ("FCT") for use when the shipper and freight forwarder truly intend their relationship to be an *agency* one. In such event, the freight forwarder will not issue an FBL but, instead, an FCT. Unlike the FBL, which names the consignor in the upper left corner, the FCT names "Suppliers or Forwarders Principals."[7]

Furthermore, the FCT lists six conditions, of which Clause 2 provides: "The undersigned do not act as Carriers but as Forwarders. In consequence they are only responsible for the careful selection of third parties, instructed by them, subject to the conditions of Clause 3 hereunder." Forwarders Certificate of Transport, cl. 2.

Clause 3 provides that the forwarder is responsible to deliver the goods to the holder of the FCT, but is not responsible for the acts or omissions of carriers involved in the execution of the transport or of other third parties. *See id.* cl. 3.

The signature block expressly refers to the forwarder's customers as "our Principals":

> We, the Undersigned Forwarders in accordance with the instructions of our Principals, have taken charge of the above-mentioned goods at: ..... for despatch and delivery as stated above or order against surrender of this document properly endorsed.

Id., signature block.

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7. For the convenience of the Court, a specimen copy of the FCT is attached to this brief as Addendum 1.

Under the framework developed by FIATA, the FCT does not subject the freight forwarder to carrier liability, as does the FBL. The FCT only obligates the freight forwarder to act as the shipper's agent to forward the goods (*i.e.*, to make arrangements with one or more carriers to perform the transport), and the forwarder's liability is restricted to failure to deliver the goods to the consignee or holder of the FCT and to negligent selection of carriers and other third parties to perform all or portions of the transport. The difference in contractual relationship established by the forwarder when using the FCT versus the FBL is also reflected in substantially different commercial terms and scope of duties and liabilities. It therefore would be inconsistent with the intent behind the FBL to hold that the forwarder is in all circumstances able to bind the shipper to sub-contracts of carriage that the forwarder enters into to carry the goods to their ultimate destination.

As the discussion above of the FBL and FCT reveals, the term "Freight Forwarder" has two different meanings in FIATA documentation. When the freight forwarder issues an FCT for the goods, it functions as a traditional freight forwarder that acts as the shipper's agent to make transportation arrangements between the shipper and the carrier. On the other hand, when the freight forwarder issues an FBL for the goods, it functions as a carrier that—far from being the agent of the shipper—is an independent contractor that contracts on its own behalf with the shipper and assumes carrier responsibility for the goods from origin to destination.

In developing such documents as the FBL and FCT, FIATA decided to retain the traditional term "Freight Forwarder," and to create new documents that would memorialize whether the freight forwarder, in respect of a

given transport, was acting as the agent of the shipper or as an independent carrier. The U.S. Federal Maritime Commission, however, chose a different path. Faced with the task of regulating freight forwarders who, in growing numbers, were issuing their own bills of lading in which they assumed carrier responsibility, the Federal Maritime Commission adopted the term "Non-Vessel-Operating Common Carrier" to denote carriers that, like FIATA freight forwarders, did not own or operate the carrying vessels, but that nevertheless assumed carrier responsibility.

The Commission created this terminology by regulation. In 1984, the U.S. Congress enacted new shipping legislation—the Shipping Act of 1984—that included the term "Non-Vessel-Operating Common Carrier" in the act itself. In 1998, Congress amended the Shipping Act of 1984 through the Ocean Shipping Reform Act of 1998. In that amendment, Congress created a single class to embrace both freight forwarders and non-vessel-operating common carriers; they were brought together under the rubric "Ocean Transportation Intermediaries."[8]

As defined in the Shipping Act, 46 U.S.C. app. § 1702(17), the United States recognizes two versions of ocean transportation intermediary—the ocean freight forwarder (*see* 46 U.S.C. app. § 1702(17)(A)) and the non-vessel-operating common carrier ((*see* 46 U.S.C. app. § 1702(17)(B)).

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8. A carrier's bill of lading issued by an ocean intermediary will have precisely the same effects and legal consequences as a bill of lading issued by a vessel-operating common carrier ("VOCC"). Indeed, in many vessel sharing arrangements, there will be no difference between a VOCC and an intermediary. Both contractually arrange for carriage to be conducted by a third party, yet both issue their own bill of lading and both contractually accept a carrier's liability.

As FIATA did not develop a different term for the freight forwarder that assumes carrier liability, in explaining the meaning of the FIATA FBL Professor Ramberg, like his prior publications on the FBL, will use the FIATA term "Freight Forwarder," and not the U.S. statutory term "Non-Vessel-Operating Common Carrier" when discussing freight forwarders that, like non-vessel-operating common carriers, are carriers when they contract transport with shippers, and thus act as principals on their own behalf rather than as agents of the shipper.

Traditionally, the term for "Freight Forwarder" in other countries has connoted the freight forwarder that acts as agent for the shipper and assumes no carrier responsibility. This probably is attributable to the term being settled upon long before the advent of containerized shipping, which eventually led to the emergence of a new niche service wherein some freight forwarders expanded their revenues by providing more complete carrier services, including the issuance of bills of lading in which they assumed carrier responsibility for shipments that they formerly merely booked in their capacity as agents of the shipper.

The role of forwarder as the shipper's booking agent appears to be reflected in the Italian word for freight forwarder—*spedizionere*—derived from the verb *spedire*, meaning to dispatch; to ship; to forward. The corresponding terms for freight forwarder in German and in Swedish are *Spediteur* and *speditör*. The French distinguish between the *transitaire* and *commissionaire de transport*. The *transitaire* is a forwarding agent, like the German *Spediteur*, and is liable only if it fails to exercise due diligence in the choice of the

carrier with whom it books the transport.[9] On the other hand, the *commissionaire de transport* has carrier responsibility, like the non-vessel-operating common carrier under U.S. law and the FIATA freight forwarder that issues an FBL and thereby assumes carrier responsibility.

In these ways, therefore, international practice has approximated the dual character of forwarders recognized by FIATA, although certain distinctions emerge in different countries. For that reason, it would be incorrect to view all forwarders the same way—their role, liabilities, and capacity to bind the shipper to their own contracts depends greatly on the contractual circumstances of their relationship to the shipper. It seems unlikely that, given those contractual differences, a unified international law for freight forwarders will emerge: the notion of "commission agent" is unknown in English law and the United States follows its own practice of designating by statute those freight forwarders that assume carrier liability as "non-vessel-operating common carriers," that are required to file carrier tariffs, maintain security against transportation-related claims, and follow most of the same requirements imposed on actual carriers.[10]

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9. French freight forwarders (*transitaires*) are regulated in the Code de Commerce, arts. 95-102.

10. *See* JAN RAMBERG, INTERNATIONAL COMMERCIAL TRANSACTIONS 169, 187 (2d ed. 2000) for a fuller discussion of the various terms used for international freight forwarders.

II. Creation of the FBL Recognized Changes in the Role of "Freight Forwarders"

Traditionally, the freight forwarder did not assume liability as a carrier. It merely acted for the purpose of connecting the shipper with the carrier, either as an agent for the shipper or as an agent for the carrier. The forwarder's traditional function as an agent has been well described in an English case, in which Justice Rowlatt explained:

> [A] forwarding agent is not a carrier; he does not obtain the possession of the goods; he does not undertake the delivery of them at the other end .... All that he does is to act as agent for the owner of the goods, to make arrangements with the people who do carry ....

Jones v. European & General Express Co., 90 L.J.K.B. 159, 160 (K.B. 1920); *see also* JAN RAMBERG, THE LAW OF FREIGHT FORWARDING 13 (2002).

The problem of distinguishing between an agent and a principal—well known in commercial law—became the principal means of determining whether a forwarder was acting as the shipper's agent or as a carrier in its own right. Although the distinction is comparatively straightforward in Anglo-American law, further complications often arise in continental European and in Scandinavian law, which recognize an "intermediate stage" between agent and principal—the so-called "commission agent," which acts in its own name but for the account of the principal. In that situation, the commission agent, by acting in its own name, would become a party to the contract, but as it acted on behalf of its principal it would owe the principal an accounting for the contract it had entered into for the benefit of the principal.

Through those means, the important distinction developed whereby the commission agent became the "formal" contracting party, while the principal, without being the "formal" contracting party became the party directly interested in the contract. Moreover, the commission agent was unable to avoid the position of "formal" contracting party by disclosing its principal, and thus a substantial difference arose between a "commission agent" under continental European and Scandinavian law and an agent of an undisclosed principal in Anglo-American law. *See* Jan Ramberg, *Freight Forwarders*, in MULTIMODAL TRANSPORT: AVOIDING LEGAL PROBLEMS 23 (Diana Faber ed. 1997); RAMBERG, LAW OF FREIGHT FORWARDING, *supra*, at 18-19.

Some of those difficulties, as well as a changing commercial environment, led freight forwarders to voluntarily accept liability as contracting carriers, usually according to general conditions elaborated by national freight forwarding associations. Historically, however, it has sometimes been difficult to resolve when the freight forwarder acted as a carrier rather than as an agent without carrier liability. The variations in practice are sufficiently large that it is difficult to reach international agreement beyond the principle that the freight forwarder that expressly accepts such liability (or that may in appropriate circumstance be implied to have assumed it) is liable as a contracting carrier. Ordinarily, when a forwarder holds itself out as a carrier in the presentation of his traffic, particularly when acting as a cargo consolidator, that would normally be sufficient as an implied agreement to make the forwarder liable as a carrier, even in the absence of an express agreement. If the forwarder issues a bill of lading assuming

carrier liability,[11] a CMR waybill[12] in his own name, or a similar transport document, this would be equivalent to an express acceptance of carrier liability. *See* RAMBERG, INTERNATIONAL COMMERCIAL TRANSACTIONS at 188 (2d ed. 2000).

The law and practice of freight forwarding developed quite differently in different countries, and was never subjected to any unifying international regime. Thus, some decades ago one had to cope with considerable difficulties and inconsistencies in deciding on the legal status of the freight forwarder (as agent or as principal). UNIDROIT—The International Institute for the Unification of Private Law[13]—prepared a Draft convention on the Contract of Agency for Forwarding Agents Relating to International Carriage of Goods, but the draft convention was not submitted to diplomatic conference. It is interesting to note, however, that UNIDROIT proposed to subject freight forwarders to carrier liability if they acted as a cargo

11. After 1971, of course, the FBL was such a bill of lading.

12. CMR refers the Convention on the Contract for International Carriage by Road, found in the United Nations Treaty Series at 399 U.N.T.S. 189.

13. As self-described in its web page, "[t]he International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental organisation with its seat in the Villa Aldobrandini in Rome. Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States." It further explains that it was "[s]et up in 1926 as an auxiliary organ of the League of Nations, the Institute was following the demise of the League, re-established in 1940 on the basis of a multilateral agreement, the UNIDROIT Statute."

consolidator, quoted a fixed price, or issued a "Titre de Commission." *See* RAMBERG, INTERNATIONAL COMMERCIAL TRANSACTIONS at 188.

Nevertheless, the tension between the irreconcilable national versions of freight forwarding law and the growing need and demand for a uniform freight forwarding law prompted the members of FIATA to put together a draft of a freight forwarder's bill of lading which would allow the issuing forwarder to indicate on the bill whether it was acting in the traditional capacity of a freight forwarder (an agent of the shipper) or as a forwarder assuming carrier liability (a non-vessel-operating common carrier).

This innovation in forwarders' bills of lading was driven by the fact that, for many years, freight forwarders had been assembling parcels from different shippers into ocean containers, railway wagons, or trucks for delivery to different consignees. As this so-called cargo consolidation service naturally expanded to the transport of goods in ocean containers, a number of the freight forwarders denounced their carrier status, although the German Code of Commerce held freight forwarders accountable as carriers, *see Handelgesetzbuch* § 413 (after the 1998 amendments, § 459), as did the French Code of Commerce, *see Code de Commerce* arts. 94-102. As a result, the previous versions of the Uniform Customs and Practice ("UCP") stipulated that bills of lading issued by freight forwarding agents should be refused. Before 1983, the rules sponsored by the ICC for documentary credits—the UCP—required bankers to reject bills of lading issued by freight forwarders. At first sight, this may seem peculiar and, indeed, discriminatory against freight forwarders. The origin is simply the traditional practice whereby freight forwarders denounced local carrier liability

in their own house bills of lading. Such local carrier liability would include from the time the forwarder accepted the goods until the time it delivered the goods to the first subcontracted carrier. When a forwarder assumes a carrier's liability, there is no sound reason not to accept a negotiable bill of lading for documentary credits.

III. The FBL Eliminated the Fundamental Difference Between "Freight Forwarders" issuing That Bill and Traditional Carriers

With the considerable increase of the container trade in the late 1960s and the ensuing development of multimodal carriage, FIATA drafted and presented in 1971 what was then called the FIATA Combined Transport Bill of Lading. This was replaced in 1992 by a version of that document now called the Negotiable FIATA Multimodal Transport Bill of Lading—i.e., the FBL. In the FBL, the freight forwarder clearly assumes liability as a carrier and liability as a multimodal transport operator subject to the 1991 UNCTAD/ICC Rules for Multimodal Transport Documents. *See* RAMBERG, INTERNATIONAL COMMERCIAL TRANSACTIONS at 486.

Now that the FBL has achieved a promise by the freight forwarders to fulfill their carrier liability functions at the local level, there is no longer a fundamental difference between the FBL and bills of lading issued by or on behalf of ship owners, shipping lines, charterers, ship operators, and container consortia. Nevertheless, the old practice created considerable confusion and difficulty, especially for banks trying to make the distinction between a freight forwarder acting as agent and a freight forwarder acting as carrier and principal in connection with the carriage of goods by sea.

The emergence of the FBL, however, forced an end to the discriminatory policy against forwarders. The 1983 version of the UCP provided that a FIATA FBL would be recognized as a carrier bill of lading when issued by a freight forwarder in connection with documentary credits. *See* JAN RAMBERG, THE LAW OF FREIGHT FORWARDING 89 (2002).

The drafters of the 1983 UCP created a specific reference to the FBL in article 25 of the UCP. From a strictly legal standpoint, article 25 was superfluous, as indicated by the more recent view of FIATA that a reference to the FBL no longer is necessary to qualify the transport document as one establishing carrier liability. *See* JAN RAMBERG, THE LAW OF FREIGHT FORWARDING 48 (2002). But the recognition of the FBL in the UCP is a significant indication that the international financial community regards the FBL in the same manner as any other negotiable bill of lading that would be issued by a vessel owner or operator.

Achieving that status for the FBL was not born without considerable pain—even within FIATA itself. Professor Ramberg still remembers when, in his capacity as Chairman of the FIATA Combined Transport Committee, he submitted the FBL for acceptance at a FIATA meeting at Geneva in 1971. The opposition from some countries—mainly on the European continent—was fierce, and it went to the point where FIATA's president, Derek Hays of the United Kingdom, threatened to resign unless the FBL was accepted. It may seem strange that there was such an opposition to something that is not only perfectly natural and is accepted today by freight forwarders all over the world, but also a powerful tool for the promotion of freight forwarding services. The problem stemmed from the particular risk distribution in insurance systems. Now that the FBL has become

universally accepted as a carrier bill of lading, the insurance markets have reacted accordingly and have long based their premiums on that legal status.

Because of the dual roles of the forwarder, however, the FBL solution has forced forwarders to increase their awareness of mandatory rules that apply to carriers and that cannot be departed from by private agreement. When a forwarder accepts a carrier's liabilities, it also accepts those mandatory rules. A choice thus has to be made whether each freight forwarder really should join the family of carriers in order to market its services more efficiently, or should remain in the category of agents. The choice has been made simple by the worldwide acceptance of the FBL, and nowadays no one would suggest that the choice was unwise.

It should be noted that freight forwarders, in the absence of applicable mandatory law, still have the option under the FIATA system to denounce their status as carriers, as evidenced by the FIATA FCT and the FIATA FCR.[14] The FCR or Forwarders Certificate of Receipt states only, as appears from its name, that the freight forwarder has taken charge of the goods for carriage but the FCR, in the same manner as the shipper's original FBL, may also be used to estop someone not holding the original FCR from giving the freight forwarder instructions with respect to the goods.

Thus, both parties to the transaction—the shipper or consignor and the freight forwarder—have the option of determining whether the freight forwarder will act as an agent, not as a carrier, by issuing a FIATA FCT; or whether

14. For the convenience of the Court, a specimen copy of the FCR is attached to this brief as Addendum 2.

the forwarder will act as a carrier, not as an agent, by issuing a FIATA FBL. *See* RAMBERG, LAW OF FREIGHT FORWARDING at 48. It bears repeating that the freight forwarder under the FCT does *not* assume a carrier's liability and that consequently it cannot be regarded as a multimodal transport operator or as any carrier at all in its capacity as issuer of an FCT. Nonetheless, the possession of an original FCT is required for the release of the cargo at destination. The FCT also would qualify as a document controlling the disposition as required by the Vienna Convention on the International Sale of Goods art. 58.2.

The FCT plainly is the document a forwarder must use to establish his status as an agent and, thereby, limit his liability to "the careful selection of third parties. . . ." *See* FIATA FCT, DOCUMENTS AND FORMS (FIATA 2001) (Addendum 1 at 11.)

There is nothing inconsistent between the FIATA form FBL on the one side and the non-vessel-operating common carrier's bill of lading, as required by the U.S. Federal Maritime Commission on the other. A FIATA freight forwarder issuing an FBL assumes the same carrier liability as an FMC non-vessel-operating common carrier. *See* 46 U.S.C. app. § 1702(17)(B) (definition of "non-vessel-operating common carrier"). If anything, the FIATA system is clearer because the FIATA freight forwarder who chooses to limit its functions to those of the traditional freight forwarder who assumes no carrier liability, may issue an FCT certifying that he assumes no carrier liability. In the U.S. system, a traditional freight forwarder who does not accept carrier responsibility issues no bill of lading, and is defined by the Shipping Act as an agent of the shipper. *See* 46 U.S.C. app. § 1702(17)(A).

There is no reason in law or comity to give the FIATA form FBL a different and contrary reading to the typical bill of lading forms used by U.S. non-vessel-operating common carriers. The FBL clearly and adequately establishes the freight forwarder as carrier with carrier liability, as the FIATA drafters of the form bill and those freight forwarders and shippers who rely on the form agree.

IV. The FBL Resolves a Freight Forwarder's Liability as Multimodal Transport Operator by adopting the "Network Principle"

The foregoing distinction between the freight forwarder as agent and as carrier is unaffected by the manner of transportation of the goods. Thus, when the transport is performed by a single mode of transport, the only contract is the one issued by the forwarder acting as carrier. When a multimodal transport is contemplated, the forwarder may still act as carrier even though each sub-contract of carriage is performed by a different mode (so-called segmented transport). Different modes of transport call for the application of different rules with respect to the basis of the transport as well as the limitation of liability. If separate contracts are made for each segment from the place of dispatch to the final destination (segmented transport), then different rules apply for each segment depending upon the mode of transport. If, on the other hand, one contract is made for transport engaging at least two different modes of transport, then it is necessary to resolve whether or not the liability of such a carrier (the so-called multimodal transport operator—MTO) should be segmented so that liability would depend upon the segment in which the loss or damage occurred. The contract should be made to reveal whether the MTO's liability is intended to be segmented so as to apply to the segment during which the loss occurred or, alternatively, whether his liability should be the same regardless

of the segment during which the loss occurred (the so-called uniform system). *See* RAMBERG, LAW OF FREIGHT FORWARDING at 18-19; RAMBERG, MULTIMODAL TRANSPORT at 25-26. The FBL resolves that choice by adopting the "network principle," pursuant to which a different liability regime applies by international convention or national law depending on which mode of transportation is being used at the time of the loss.

CONCLUSION

For the foregoing reasons, Professor Ramberg urges this Court to construe the FBL form in this case as that form was intended to be interpreted, *i.e.*, as a contract of carriage between the issuing freight forwarder and the named shipper or consignor, creating between them a carrier-shipper relationship, not an agency relationship.

Respectfully submitted,

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* Counsel gratefully acknowledges the work of Michael W. Lodwick, the principal author of this brief, who died less than a week after finishing a substantially complete draft of this brief.

APPENDIX

Excerpts From Documents And Forms Of The International Federation Of Freight Forwarders Associations

DOCUMENTS AND FORMS
DOCUMENTS ET FORMULAIRES
DOKUMENTE UND FORMULARE

International Federation of Freight Forwarders Associations
Fédération Internationale des Associations de Transitaires et Assimilés
Internationale Föderation der Spediteurorganisationen

orized by FIATA. Copyright FIATA / Zurich - Switzerland 2.82

Suppliers or Forwarders Principals

System of National Association

FIATA FCR

No.

Forwarders Certificate of Receipt

ORIGINAL

Form Ref.

Consignee

Marks and numbers	Number and kind of packages	Description of goods	Gross weight	Measurement

specimen

according to the declaration of the consignor

The goods and instructions are accepted and dealt with subject to the General Conditions printed overleaf

We certify having assumed control of the above mentioned consignment in external apparent good order and condition

☐ at the disposal of the consignee

with irrevocable instructions*

☐ to be forwarded to the consignee

Remarks

Instructions as to freight and charges

* Forwarding instructions can only be cancelled or altered if the original Certificate is surrendered to us, and then only provided we are still in a position to comply with such cancellation or alteration.

Instructions authorizing disposal by a third party can only be cancelled or altered if the original Certificate of Receipt is surrendered to us, and then only provided we have not yet received instructions under the original authority.

Place and date of issue

Stamp an signature

FIATA FCR
Forwarders Certificate of Receipt

The Forwarders Certificate of Receipt was introduced by FIATA for the use by international freight forwarders within the organisation of FIATA. The FIATA FCR document enables the freight forwarder to provide the consignor with a special document as an official acknowledgement that he has assumed responsibility of the goods.

The FIATA FCR can be handed over to the consignor immediately after the freight forwarder has received the consignment.

By completing the FIATA FCR the freight forwarder certifies that he is in possession of a specific consignment with irrevocable instructions for despatch to the consignee shown in the document or for keeping it at his disposal. These instructions may only be cancelled if the original FIATA FCR document is handed over to the issuing freight forwarder and only if he is in a position to comply with such cancellation or alteration.

The FIATA FCR will primarily be used when the supplier sells the goods ex works and needs to prove that he has complied with his obligations to the buyer by presenting a FIATA FCR. In the case of a Letter of Credit the seller will under such conditions be able to present a FIATA FCR issued by a forwarder in order to obtain payment of the sales price placed at his disposal by the buyer under the terms of the Letter of Credit. The seller can no longer dispose of goods handed over to the forwarder once the FIATA FCR document has been handed over to the buyer.

The FIATA FCR is not negotiable. As the delivery of the consignment to the consignee does not depend on the handing over of this document, only one original is issued. Should further copies be required, forms specially overprinted with the words "Copy not negotiable" should be used.

When issuing a FIATA FCR, the freight forwarder should ensure that:

1) he has taken over the goods specified therein and that the right of disposal of these goods is vested solely in him;

2) the goods appear to be in apparent good order and condition;

3) the details on the document clearly correspond with the instructions he has received;

4) the conditions of freight documents (B/L etc.) are not contrary to the obligations he has assumed according to the FIATA FCR document.

The FIATA FCR bears the general national freight forwarding conditions of the issuing country on the reverse. The document may only be used by freight forwarders who adhere to these general conditions in their forwarding activities.

It is recommended that the freight forwarder covers his liability by insurance in accordance with the FIATA FCR requirements.

FIATA FCR
Forwarders Certificate of Receipt

Le Forwarders Certificate of Receipt a été introduit par la FIATA pour être utilisé par les transitaires internationaux, organisés dans le cadre de la FIATA. Le FIATA FCR permet au transitaire de remettre à l'expéditeur un document spécial attestant officiellement la prise en charge de la marchandise par ses soins.

Le FIATA FCR peut être remis à l'expéditeur immédiatement après réception de la marchandise par le transitaire.

En établissant un FIATA FCR, le transitaire certifie qu'il est en possession d'un envoi clairement identifié, avec des instructions irrévocables d'expédier les marchandises au destinataire indiqué sur le document, ou de les tenir à sa disposition. Cet ordre ne peut être annulé que si l'original du FIATA FCR est retourné au transitaire qui l'a émis, et uniquement si le transitaire est encore en mesure d'en effectuer l'annulation ou la modification demandée.

Le FIATA FCR sera avant tout utilisé lorsque le fournisseur vend sa marchandise départ usine et a besoin de prouver qu'il a rempli ses obligations envers l'acheteur par la présentation d'un FIATA FCR. Dans le cas d'une lettre de crédit, le vendeur pourra dans ces conditions présenter un FIATA FCR, émis par le transitaire, en vue d'obtenir le paiement du prix de vente tenu à sa disposition par l'acheteur selon les termes de la lettre de crédit. Le vendeur ne peut plus disposer des marchandises remises au transitaire, quand le document FIATA FCR a été remis à l'acheteur.

Le FIATA FCR n'est pas négociable. Etant donné que la délivrance de la marchandise au destinataire ne dépend pas de la remise de ce document, un seul original est établi. Si des copies supplémentaires sont requises, il sera fait usage de formulaires surimprimés à cette fin avec les mots "Copie non négociable".

En émettant le document FIATA FCR, le transitaire doit s'assurer, que:

1) les marchandises dans ce document ont été réceptionnées par lui-même et qu'il est seul en droit de disposer de ces marchandises;

2) les marchandises paraissent être en bon état apparent;

3) les données reprises dans le document correspondent exactement aux instructions reçues;

4) les conditions des documents de transport (B/L, etc.) ne sont pas en contradiction avec les obligations qu'il assume conformément au document FIATA FCR.

Le document FIATA FCR comporte au verso les Conditions Générales du pays de l'organisation membre. Les seules entreprises de transitaires autorisées à émettre ce document sont les entreprises de transitaires qui s'engagent à appliquer ces Conditions Générales dans leurs transactions commerciales.

Il est recommandé que le transitaire couvre sa responsabilité par une assurance conforme aux conditions du FIATA FCR.

Suppliers or Forwarders Principals

Stamp of National Association

FIATA FCT

No.

Forwarders Certificate of Transport

ORIGINAL

Forw. Ref.

Consigned to order of

Notify address

Conveyance — from/via

Destination

Marks and numbers | Number and kind of packages | Description of goods | Gross weight | Measurement

specimen

according to the declaration of the consignor

The goods and instructions are accepted and dealt with subject to the General Conditions printed overleaf.

Acceptance of this document or the invocation of rights arising therefrom acknowledges the validity of the following conditions, regulations and exceptions also of the trading conditions printed overleaf, except where the latter conflict with conditions 1–8 below.

1. The undersigned are authorized to enter into contracts with carriers and others involved in the execution of the transport subject to the latter's usual terms and conditions.
2. The undersigned do not act as Carriers but as Forwarders. In consequence they are only responsible for the careful selection of third parties, instructed by them, subject to the conditions of Clauses 3 hereunder.
3. The undersigned are responsible for delivery of the goods to the holder of this document through the intermediary of a delivery agent of their choice. They are not responsible for acts or omissions of Carriers involved in the execution of the transport or of other third parties. The undersigned Forwarders will, on request, assign their rights and claims against Carriers and other parties.
4. Insurance of the goods will only be effected upon express instructions in writing.
5. Unforeseen and/or unforeseeable circumstances entitle the undersigned to arrange for deviation from the envisaged route and/or method of transport.
6. Unforeseen and/or unforeseeable disbursements and charges are for the account of the goods.

Insurance through the intermediary of the undersigned Forwarders

☐ Not covered

☐ Covered according to the attached Insurance Policy/Certificate

All disputes shall be governed by the law and within the exclusive jurisdiction of the courts at the place of issue.

For delivery of the goods please apply to:

Freight and charges prepaid to:

Charges for account of goods, load or rail load.

We, the Undersigned Forwarders, in accordance with the instructions of our Principals, have taken charge of the abovementioned goods in good external condition as/: .....

for despatch and delivery as stated above or under signed surrender of this document properly endorsed.

In witness thereof the Undersigned Forwarders have signed ..... originals of this FCT document, all of this tenor and date. When one of these has been accomplished, the other(s) will have their validity. .....

Place and date of issue

Stamp and signature

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FIATA FCT
Forwarders Certificate of Transport

The Forwarders Certificate of Transport was introduced by FIATA for the use by international freight forwarders within the FIATA Organisations.

By issuing a FIATA FCT document to the consignor, the freight forwarder assumes the obligation to deliver the goods at destination through the medium of an agent appointed by him. The FIATA FCT can be handed over to the consignor immediately after the consignment has been handed over to the freight forwarder for shipment.

By issuing the FIATA FCT the freight forwarder certifies that he has assumed responsibility for dispatch and delivery of specific goods according to instructions he has received from the consignor as indicated in the document.

The freight forwarder is responsible for the delivery of the goods at destination through a delivery agent appointed by him to the holder of the document in accordance with the conditions stipulated on the reverse of the FIATA FCT.

The FIATA FCT has a "block" function. The freight forwarder is only responsible for the forwarding and delivery of the goods. The FIATA FCT, as distinguished from the FBL, is not a document subjecting the freight forwarder to a liability as carrier but his liability is governed by the applicable freight forwarding conditions.

The FIATA FCT will therefore be of importance in all cases where the transport has to be arranged for delivery to the consignee. The seller will be able to obtain payment of the selling price from his bank against the FIATA FCT "cash against Documents"

The FIATA FCT is negotiable when made out "to Order" (see also ICC Doc. 470/251 Art. 24)

The FIATA FCT is negotiable, as the delivery of the consignment may only be effected against presentation of the original document, duly endorsed.

When issuing the FIATA FCT document the freight forwarder should ensure that:

1) he has taken over the goods specified therein and that the right of disposal of these goods vested solely in him;

2) the goods appear to be in apparent good order and condition;

3) the details on the document clearly correspond with the instructions he has received;

4) conditions of freight documents (B/L etc.) are not contrary to the obligations he has assumed according to the FIATA FCT document;

5) responsibility for the insurance of the goods has been agreed;

6) it is clearly specified whether one or more originals have been issued.

It is recommended to dispatch the FIATA FCT documents by registered post only.

The FIATA FCT bears the general national forwarding conditions of the issuing country on the reverse. The document may only be used by freight forwarders who adhere to these general conditions in their forwarding activities.

Greatest possible care must be taken in the preparation of these documents as the particulars contained therein must reflect accurately the full details of the consignment. For the preparation of the document by the issuing freight forwarder, the collection of a fee is therefore justified and advisable.

FBL

NEGOTIABLE FIATA MULTIMODAL TRANSPORT BILL OF LADING
issued subject to UNCTAD/ICC Rules for Multimodal Transport Documents (ICC Publication 481)

Consignee to order of

Notify address

Place of receipt

Ocean vessel | Port of loading

Port of discharge | Place of delivery

Marks and numbers	Number and kind of packages	Description of goods	Gross weight	Measurement

specimen

according to the declaration of the consignor

Declaration of interest of the consignor in timely delivery (Clause 6.2.)

Declared value for ad valorem rate according to the declaration of the consignor (Clauses 7 and 8)

The goods and instructions are accepted and dealt with subject to the Standard Conditions printed overleaf.

Taken in charge in apparent good order and condition, unless otherwise noted herein, at the place of receipt for transport and delivery as mentioned above.

One of these Multimodal Transport Bills of Lading must be surrendered duly endorsed in exchange for the goods. In Witness whereof the original Multimodal Transport Bills of Lading all of this tenor and date have been signed in the number stated below, one of which being accomplished the other(s) to be void.

Freight amount	Freight payable at	Place and date of issue
Cargo insurance through the undersigned ☐ not covered ☐ Covered according to attached Policy	Number of Original FBL's	Stamp and signature
For delivery of goods please apply to:		

BEST AVAILABLE COPY

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Standard Conditions (1992) governing the FIATA MULTIMODAL TRANSPORT BILL OF LADING

Definitions

Freight Forwarder means the Multimodal Transport Operator who issues this FBL and is named on the face of it and assumes liability for the performance of the multimodal transport contract as a carrier. Also hereinafter means and includes the Shipper, the Consignor, the Consignee, the Holder of this FBL, the Receiver and the Owner of the Goods.

Consignor means the person who concludes the multimodal transport contract with the Freight Forwarder.

Consignee means the person entitled to receive the goods from the Freight Forwarder.

Taken in charge means that the goods have been handed over to and accepted for carriage by the Freight Forwarder at the place of receipt evidenced on this FBL.

Goods means any property including live animals as well as containers, pallets or similar articles of transport or packaging not supplied by the Freight Forwarder, irrespective of whether such property is to be or is carried on or under deck.

1 **Applicability**
Notwithstanding the heading „FIATA Multimodal Transport Bill of Lading (FBL)" these conditions shall also apply if only one mode of transport is used.

2 **Issuance of this FBL**
2.1 By issuance of this FBL the Freight Forwarder
a) undertakes to perform and/or in his own name to procure the performance of the entire transport from the place at which the goods are taken in charge (place of receipt evidenced in this FBL) to the place of delivery designated in this FBL
b) assumes liability as set out in these conditions.
2.2 Subject to the conditions of this FBL the Freight Forwarder shall be responsible for the acts and omissions of his servants or agents acting within the scope of their employment, or any other person of whose services he makes use for the performance of the contract evidenced by this FBL, as if such acts and omissions were his own.

3 **Negotiability and title to the goods**
3.1 This FBL is issued in a negotiable form unless it is marked „non negotiable". It shall constitute title to the goods and the holder by endorsement of this FBL, shall be entitled to receive or to transfer the goods herein mentioned.
3.2 The information in this FBL shall be prima facie evidence of the taking in charge by the Freight Forwarder of the goods as described by such information unless a contrary indication, such as „shipper's weight, load and count", „shipper packed container" or similar expressions, has been made in the printed text or superimposed on this FBL. However proof to the contrary shall not be admissible when a negotiable FBL has been transferred to the consignee for valuable consideration who in good faith has relied upon or set thereon.

4 **Dangerous Goods and Indemnity**
4.1 The Merchant shall comply with rules which are mandatory according to the national law or by reason of International Convention, relating to the carriage of goods of a dangerous nature, and shall in any case inform the Freight Forwarder in writing of the exact nature of the danger before goods of a dangerous nature are taken in charge by the Freight Forwarder and indicate to him, if need be, the precautions to be taken.
4.2 If the Merchant fails to provide such information and the Freight Forwarder is unaware of the dangerous nature of the goods and the necessary precautions to be taken and if, at any time, they are deemed to be a hazard to life or property, they may at any place be unloaded, destroyed or rendered harmless, as circumstances may require, without compensation. The Merchant shall indemnify the Freight Forwarder against all loss, damage, liability or expense arising out of their being taken in charge, or their carriage, or of any measure ordered thereto.
The burden of proving that the Freight Forwarder knew the exact nature of the danger constituted by the carriage of the said goods shall rest on the Merchant.
4.3 If any goods shall become a danger to life or property, they may in like manner be unloaded or landed at any place or destroyed or rendered harmless, if such danger was not caused by the fault and neglect of the Freight Forwarder. He shall have no liability and the Merchant shall indemnify him against all loss, damage, liability and expenses arising therefrom.

5 **Description of Goods and Merchant's Packing and Inspection**
5.1 The Consignor shall be deemed to have guaranteed to the Freight Forwarder the accuracy, at the time the goods were taken in charge by the Freight Forwarder, of all particulars relating to the general nature of the goods, their marks, number, weight, volume and quantity, and, if applicable, to the dangerous character of the goods, as furnished by him or on his behalf for insertion on the FBL.
The Consignor shall indemnify the Freight Forwarder against all loss, damage and expense resulting from any inaccuracy or inadequacy of such particulars.
The Consignor shall remain liable even if the FBL has been transferred by him.
The right of the Freight Forwarder to such an indemnity shall in no way limit his liability under this FBL to any person other than the Consignor.
5.2 The Freight Forwarder shall not be liable for any loss, damage or expense caused by defective or inadequate packing of goods or by inadequate loading or packing within containers or other transport units when such loading or packing has been performed by the Merchant or on his behalf by a person other than the Freight Forwarder or by the defect or unsuitability of the containers or other transport units supplied by the Merchant, or if supplied by the Freight Forwarder if a defect or unsuitability of the container or other transport unit would have been apparent upon reasonable inspection by the Merchant.
The Merchant shall indemnify the Freight Forwarder against all loss, damage, liability and expense so incurred.

6 **Freight Forwarder's Liability**
6.1 The responsibility of the Freight Forwarder for the goods under these conditions covers the period from the time the Freight Forwarder has taken the goods in his charge to the time of their delivery.
6.2 The Freight Forwarder shall be liable for loss of or damage to the goods as well as for delay in delivery if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in Clause 2.1 a. unless the Freight Forwarder proves that no fault or neglect of his own, his servants or agents or any other person referred to in Clause 2.2 has caused or contributed to such loss, damage or delay. However the Freight Forwarder shall only be liable for loss following from delay in delivery if the Consignor has made a declaration of interest in timely delivery which has been accepted by the Freight Forwarder and stated in the FBL.
6.3 Arrival times are not guaranteed by the Freight Forwarder. However, delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon or, in the absence of such agreement, within the time which would be reasonable to require of a diligent Freight Forwarder, having regard to the circumstances of the case.
6.4 If the goods have not been delivered within ninety consecutive days following such date of delivery as determined in Clause 6.3, the claimant may, in the absence of evidence to the contrary, treat the goods as lost.
6.5 When the Freight Forwarder establishes that, in the circumstances of the case, the loss or damage could be attributed to one or more causes or events specified in a. - e. of the present clause, it shall be presumed that it was so caused, always provided, however, that the claimant shall be entitled to prove that the loss or damage was not, in fact, caused wholly or partly by one or more of such causes or events:
a. an act or omission of the Merchant or person other than the Freight Forwarder acting on behalf of the Merchant or from whom the Freight Forwarder took the goods in charge
b. insufficiency or defective condition of the packaging or marks and/or numbers
c. handling, loading, stowage or unloading of the goods by the Merchant or any person acting on behalf of the Merchant
d. inherent vice of the goods
e. strike, lockout, stoppage or restraint of labour.
6.6 **Defences for carriage by sea or inland waterways**
Notwithstanding Clauses 6.2., 6.3. and 6.4. the Freight Forwarder shall not be liable for loss, damage or delay in delivery with respect to goods carried by sea or inland waterways when such loss, damage or delay during such carriage has been caused by:
a. act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship
b. fire, unless caused by the actual fault or privity of the carrier, however, always provided that whenever loss or damage has resulted from unseaworthiness of the ship, the Freight Forwarder can prove that due diligence has been exercised to make the ship seaworthy at the commencement of the voyage.

7 **Paramount Clauses**
7.1 These conditions shall only take effect to the extent that they are not contrary to the mandatory provisions of International Conventions or national law applicable to the contract evidenced by this FBL.
7.2 The Hague Rules contained in the International Convention for the unification of certain rules relating to Bills of Lading, dated Brussels 25th August 1924, or in those countries where they are already in force the Hague Visby Rules contained in the Protocol of Brussels, dated 23rd February 1968, as enacted in the Country of Shipment, shall apply to all carriage of goods by sea and also to the carriage of goods by inland waterways and such provisions shall apply to all goods whether carried on deck or under deck.
7.3 The Carriage of Goods by Sea Act of the United States of America (COGSA) shall apply to the carriage of goods by sea, whether on deck or under deck, if compulsorily applicable to this FBL or would be applicable but for the goods being carried on deck in accordance with a statement on this FBL.

8 **Limitation of Freight Forwarder's Liability**
8.1 Assessment of compensation for loss of or damage to the goods shall be made by reference to the value of such goods at the place and time they are delivered to the consignee or at the place and time when, in accordance with this FBL, they should have been so delivered.
8.2 The value of the goods shall be determined according to the current commodity exchange price or, if there is no such price, according to the current market price or, if there are no such prices, by reference to the normal value of goods of the same name and quality.
8.3 Subject to the provisions of subclauses 8.4. to 8.9. inclusive, the Freight Forwarder shall in no event be or become liable for any loss of or damage to the goods in an amount exceeding the equivalent of 666.67 SDR per package or unit or 2 SDR per kilogramme of gross weight of the goods lost or damaged, whichever is the higher, unless the nature and value of the goods shall have been declared by the Consignor and accepted by the Freight Forwarder before the goods have been taken in his charge, or the ad valorem freight rate paid, and such value is stated in the FBL by him, then such declared value shall be the limit.
8.4 Where a container, pallet or similar article of transport is loaded with more than one package or unit, the packages or other shipping units enumerated in the FBL as packed in such article of transport are deemed packages or shipping units. Except as aforesaid, such article of transport shall be considered the package or unit.
8.5 Notwithstanding the above mentioned provisions, if the multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the Freight Forwarder shall be limited to an amount not exceeding 8.33 SDR per kilogramme of gross weight of the goods lost or damaged.
8.6 a. When the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law would have provided another limit of liability if a separate contract of carriage had been made for that particular stage of transport, then the limit of the Freight Forwarder's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law.
b. Unless the nature and value of the goods shall have been declared by the Merchant and inserted in this FBL, and the ad valorem freight rate paid, the liability of the Freight Forwarder under CO/SSA, where applicable, shall not exceed US$ 500 per package or, in the case of goods not shipped in packages, per customary freight unit.
8.7 If the Freight Forwarder is liable in respect of loss following from delay in delivery, or consequential loss or damage other than loss of or damage to the goods, the liability of the Freight Forwarder shall be limited to an amount not exceeding the equivalent of twice the freight under the multimodal contract for the multimodal transport under this FBL.
8.8 The aggregate liability of Freight Forwarder shall not exceed the limits of liability for total loss of the goods.
8.9 The Freight Forwarder is not entitled to the benefit of the limitation of liability if it is proved that the loss, damage or delay in delivery resulted from a personal act or omission of the Freight Forwarder done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

9 **Applicability to Actions in Tort**
These conditions apply to all claims against the Freight Forwarder relating to the performance of the contract evidenced by this FBL, whether the claim be founded in contract or in tort.

10 **Liability of Servants and other Persons**
10.1 These conditions apply whenever claims relating to the performance of the contract evidenced by this FBL are made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract, whether such claims are founded in contract or in tort, and the aggregate liability of the Freight Forwarder and of such servants, agents or other persons shall not exceed the limits in clause 8.
10.2 In entering into this contract as evidenced by this FBL, the Freight Forwarder, to the extent of these provisions, does not only act on his own behalf, but also as agent or trustee for such persons, and such persons shall to this extent be or be deemed to be parties to this contract.
10.3 However, if it is proved that the loss of or such loss or damage to the goods resulted from a personal act or omission of such a person referred to in Clause 10.1., done with intent to cause damage, or recklessly and with knowledge that damage would probably result, such person shall not be entitled to benefit of limitation of liability provided for in Clause 8.
10.4 The aggregate of the amounts recoverable from the Freight Forwarder and the persons referred to in Clauses 2.2. and 10.1. shall not exceed the limits provided for in these conditions.

11 **Method and Route of Transportation**
Without notice to the Merchant, the Freight Forwarder has the liberty to carry the goods on or under deck and to choose or substitute the means, route and procedure to be followed in the handling, stowage, storage and transportation of the goods.

12 **Delivery**
12.1 Goods shall be deemed to be delivered when they have been handed over or placed at the disposal of the Consignee or his agent in accordance with this FBL, or when the goods have been handed over to any authority or other party to whom, pursuant to the law or regulation applicable at the place of delivery, the goods must be handed over, or such other place at which the Freight Forwarder is entitled to call upon the Merchant to take delivery.
12.2 The Freight Forwarder shall also be entitled to store the goods at the sole risk of the Merchant, and the Freight Forwarder's liability shall cease, and the cost of such storage shall be paid upon demand, by the Merchant to the Freight Forwarder.
12.3 If at any time the carriage under this FBL is or is likely to be affected by any hindrance or risk of any kind including the condition of the goods) not arising from any fault or neglect of the Freight Forwarder or a person referred to in Clause 2.2 and which cannot be avoided by the exercise of reasonable endeavours the Freight Forwarder may
abandon the carriage of the goods under this FBL and, where reasonably possible, place the goods or any part of them at the Merchant's disposal at any place which the Freight Forwarder may deem safe and convenient, whereupon delivery shall be deemed to have been made and the responsibility of the Freight Forwarder in respect of such goods shall cease.
In any event, the Freight Forwarder shall be entitled to full freight under this FBL and the Merchant shall pay any additional costs resulting from the above mentioned circumstances.

13 **Freight and Charges**
13.1 Freight shall be paid in cash, without any reduction or deferment on account of any claim, counterclaim or set-off, whether prepaid or payable at destination.
Freight shall be considered as earned by the Freight Forwarder at the moment when the goods have been taken in his charge, and not to be returned in any event.
13.2 Freight and all other amounts mentioned in this FBL are to be paid in the currency named in the FBL or at the Freight Forwarder's option, in the currency of the country of dispatch or destination at the highest rate of exchange for bankers sight bills current for prepaid freight on the day of dispatch and for freight payable at destination on the day when the Merchant is notified on arrival of the goods there or on the date of withdrawal of the delivery order, whichever rate is the higher, or at the option of the Freight Forwarder on the date of this FBL.
13.3 All dues, taxes and charges or other expenses in connection with the goods shall be paid by the Merchant.
Where equipment is supplied by the Freight Forwarder, the Merchant shall pay all demurrage and charges which are not due to a fault or neglect of the Freight Forwarder.
13.4 The Merchant shall reimburse the Freight Forwarder in proportion to the amount of freight for any costs for deviation or delay or any other increase of costs of whatever nature caused by war, warlike operations, epidemics, strikes, government directions or force majeure.
13.5 The Merchant warrants the correctness of the declaration of contents, insurance, weight, measurements or value of the goods but the Freight Forwarder has the liberty to have the contents inspected and the weight, measurements or value verified. If on such inspection it is found that the declaration is not correct, it is agreed that a sum equal either to five times the difference between the correct figure and the freight charged, or to double the correct freight less the freight charged, whichever sum is the smaller shall be payable as liquidated damages to the Freight Forwarder for his inspection costs and losses of freight on other goods notwithstanding any other sum having been stated on this FBL as freight payable.
13.6 Despite the acceptance by the Freight Forwarder of instructions to collect freight, charges or other expenses from any other person in respect of the transport under this FBL, the Merchant shall remain responsible for such monies on receipt of evidence of demand and the absence of payment for whatever reason.

14 **Lien**
The Freight Forwarder shall have a lien on the goods and any documents relating thereto for any amount due at any time to the Freight Forwarder from the Merchant including storage fees and the cost of recovering same, and may enforce such lien in any reasonable manner which he may think fit.

15 **General Average**
The Merchant shall indemnify the Freight Forwarder in respect of any claims of a General Average nature which may be made on him and shall provide such security as may be required by the Freight Forwarder in this connection.

16 **Notice**
16.1 Unless notice of loss of or damage to the goods, specifying the general nature of such loss or damage, is given in writing by the consignee to the Freight Forwarder when the goods are delivered to the consignee in accordance with clause 12, such handing over is prima facie evidence of the delivery by the Freight Forwarder of the goods as described in this FBL.
16.2 Where the loss or damage is not apparent, the same prima facie effect shall apply if notice in writing is not given within 6 consecutive days after the day when the goods were delivered to the consignee in accordance with clause 12.

17 **Time bar**
The Freight Forwarder shall, unless otherwise expressly agreed, be discharged of all liability under these conditions unless suit is brought within 9 months after the delivery of the goods, or the date when the goods should have been delivered, or the date when in accordance with clause 8.4. failure to deliver the goods would give the consignee the right to treat the goods as lost.

18 **Partial invalidity**
If any clause or a part thereof is held to be invalid, the validity of this FBL and the remaining clauses or a part thereof shall not be affected.

19 **Jurisdiction and applicable law**
Actions against the Freight Forwarder may be instituted only in the place where the Freight Forwarder has his place of business as stated on the reverse of this FBL and shall be decided according to the law of the country in which that place of business is situated.

The ICC logo denotes that this document has been deemed by the ICC to be in conformity with the UNCTAD/ICC Rules for Multimodal Transport Documents. The ICC logo does not imply ICC endorsement of the document nor does it in any way make the ICC party to any possible legal action resulting from the use of this document.

FBL
Negotiable FIATA Multimodal Transport Bill of Lading

The FIATA Multimodal Transport Bill of Lading (FBL) is a carrier-type transport document set up by FIATA for the use by freight forwarders acting as multimodal transport operators (MTO).

The FBL can also be issued as a marine bill of lading.

The document is negotiable unless marked "non-negotiable". It has been deemed by the International Chamber of Commerce (ICC) to be in conformity with the UNCTAD/ICC Rules for Multimodal Transport Documents published by ICC in its brochure No. 481. Therefore, the FBL bears the ICC logo alongside the symbol of the national freight forwarders association.

Furthermore, the Negotiable FIATA Multimodal Transport Bill of Lading is referred to in the "Guide for Documentary Credit Operations for the Uniform Customs and Practice for Documentary Credits (UCP 500)" of ICC (ICC publication No.515) as an acceptable freight forwarders transport document.

A freight forwarder acting as Multimodal Transport Operator (MTO) or marine carrier issuing a FBL is responsible for the performance of transport. The freight forwarder does not only assume responsibility for delivery of the goods at destination, but also for all carriers and third parties engaged by him for the performance of the whole transport.

By issuing a FBL the freight forwarder accepts a basic liability limit of 666.67 SDR per package or unit, or 2 SDR per kilogram of gross weight of the goods lost or damaged, whichever is the higher (Art. 8.3 of the FBL conditions), or, if a multimodal transport does not include carriage of goods by sea or inland waterways, a basic liability limit of 8.33 SDR per gross weight (Art. 8.5 of the FBL conditions). When loss of or damage to the goods can be attributed to a particular stage of transport in a multimodal transport operation, the freight forwarder's liability is limited according to mandatory national or international law applicable to this stage of transport (Art. 8.6 a of the FBL conditions).

When issuing a FBL, the freight forwarder should ensure

1) that he has taken over the goods specified therein and that the right of disposal of these goods is solely vested in him;

2) that the goods appear to be in apparent good order and condition;

3) that details on the document correspond with the instructions he has received;

4) that responsibility for cargo insurance cover has been agreed upon with the consignor;

5) that it is clearly specified how many original FBLs are issued.

Freight Forwarders issuing FBLs have to insure their liability in accordance with the FBL conditions.

(31)

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IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY, PTY LTD. d/b/a KIRBY ENGINEERING
AND ALLIANZ AUSTRALIA LIMITED,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF TRANSPORTATION INTERMEDIARIES ASSOCIATION AS *AMICUS CURIAE* SUPPORTING AFFIRMANCE IN PART OF THE DECISION BELOW

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QUESTION PRESENTED

Whether a cargo owner that contracts with a freight forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with the carriers to provide that transportation.

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BRIEF OF TRANSPORTATION INTERMEDIARIES ASSOCIATION AS *AMICUS CURIAE* SUPPORTING AFFIRMANCE IN PART OF THE DECISION BELOW

INTEREST OF *AMICUS* TRANSPORTATION INTERMEDIARIES ASSOCIATION [1]

The Transportation Intermediaries Association (TIA) is the professional organization of the $80.6 billion third party logistics industry. TIA is the only U.S. organization exclusively representing transportation intermediaries of all disciplines doing business in domestic and international commerce. TIA is the voice of transportation intermediaries

[1] Pursuant to this Court's Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and no person or entity made a monetary contribution to the preparation or submission of the brief.

to shippers, carriers, government officials, and international organizations.

TIA members include approximately 800 motor carrier property brokers, surface freight forwarders, international ocean transportation intermediaries (ocean freight forwarders and non-vessel-operating common carriers), air forwarders, customs brokers, warehouse operators, logistics management companies, intermodal marketing companies, and motor carriers.

TIA is also the U.S. member of the International Federation of Freight Forwarders Associations (FIATA), the worldwide trade association of transportation intermediaries representing more than 40,000 companies in virtually every trading country. TIA participates in the various FIATA institutes and committees, including those responsible for developing the standard form of shipment documentation used throughout the industry world wide. The freight forwarder bill of lading at issue in this case was developed by FIATA, and its use is licensed to TIA and the other FIATA member associations.

THE ROLE OF TRANSPORTATION INTERMEDIARIES

Transportation intermediaries or third party logistics professionals act as the "travel agents" for freight. They serve tens of thousands of shippers and carriers, bringing together the transportation needs of the cargo interests with the corresponding capacity and special equipment offered by rail, motor, air, and ocean carriers. Transportation intermediaries play a key role in cross border transportation by land, sea and air.

Traditionally, transportation intermediaries have been primarily non-asset based companies whose expertise is providing mode- and carrier-neutral transportation arrangements

for shippers with the underlying asset-owning and operating carriers. They get to know the details of a shipper's business, then tailor a package of transportation services, sometimes by various modes of transportation, to meet those needs. Transportation intermediaries bring a targeted expertise to meet the shippers' transportation needs. Transportation intermediaries invest in sophisticated software that helps maximize logistics efficiency. Today, many also invest in physical assets such as trucks, aircraft, warehouses, and consolidation centers so that they can offer a fuller, vertically integrated range of service options.

Over the past decade, many shippers of cargo have streamlined their acquisition and distribution operations. They have reduced their in-house transportation departments, and have chosen to deal with only a few "core carriers" directly. Increasingly, they have contracted out the function of arranging transportation to intermediaries or third party experts. Every Fortune 100 Company now has at least one third party logistics company ("3PL") as one of its core carriers. Since the intermediary or 3PL, in turn, may have relationships with dozens, or even thousands, of underlying carriers, the shipper has many service options available to it from a single source by employing an intermediary to serve either as its agent or as the carrier, according to its needs. In 2001, 3PLs directed the purchase of $80.6 billion in transportation services.[2]

[2] TIA estimates that property brokers and freight forwarders directed the purchase of $57 billion of motor transport, intermodal marketing companies directed the purchase of $4.2 billion in rail intermodal, ocean transportation intermediaries directed the purchase of $1.6 billion in ocean transport, and air forwarders directed the purchase of $14.4 billion in air freight.

SUMMARY OF ARGUMENT

Intermediaries are independent contractors. They negotiate the terms and conditions of the services to be provided to their customers, including the role to be played by the intermediary at each stage of the transportation movement. The decision whether the intermediary will act as either carrier (principal) or agent of the shipper depends on many commercial variables, including the range of transportation services needed, and who makes those decisions, cost and availability of insurance, terms of the underlying financing of the sale of goods being moved, ancillary services required (warehousing, packing, inventory control), and many others. In this case, a sophisticated shipper and freight forwarder decided that the forwarder would act as carrier for the transportation at issue, and documented their transaction accordingly by using the FIATA Multimodal Transport Bill of Lading (FBL). By attributing agency status to the forwarder, as suggested by Petitioner, *amicus curiae* World Shipping Council (WSC), and others, the Court would not only unravel the freely-negotiated commercial decision made by the parties as to their respective roles, but also deprive intermediaries of the flexibility essential for them to tailor services to meet the needs of their customers.

ARGUMENT

I. A RULE AUTOMATICALLY BINDING SHIPPERS TO THE CONTRACTS MADE BY INTERMEDIARIES IS INCONSISTENT WITH COMMERCIAL PRACTICE

Petitioner and various *amici* have asked the Court to disregard the contracts entered into by an intermediary and its customer, and to hold that the intermediary acted as the shipper's agent, thereby binding the shipper to the terms of the underlying ocean carrier's bill of lading, even though the shipper was not a party to that contract. TIA's paramount

interest in this proceeding is to preserve the longstanding principle that intermediaries act as independent contractors, and that their relationships with their customers are a matter of contract to be freely negotiated between them. To provide the range of services demanded by their shipper customers, intermediaries must have the option to choose to act as agent, or as principal, or as a third party logistics provider combining both roles as to distinct segments of the carriage, depending on the circumstances of each individual transaction. Those are fundamentally questions of contractual freedom and interpretation, and this Court should not upset decades of established commercial practices by imposing on the marketplace a "one-size-fits-all" solution that denies private actors the right to shape their relationships as they deem best suited to their needs.

A. Use of the FBL Here Clarified ICC's Status As "Carrier or Principal"

The practical consequences of a decision depriving intermediaries of this flexibility, and attributing agency status to them even when they have explicitly agreed with their customers *not* to act as agent, would cut across all modes of transportation and unsettle well-established patterns of commercial activity worldwide. The transaction at issue in this case is a perfect illustration of the efficient operation of the current system, and of the destructive effect that could flow from a decision to treat the intermediary as a shipper's agent as a matter of law, despite their agreement to the contrary.

ICC, the intermediary in this case, negotiated an arrangement with its customer to transport ten containers of machinery from Australia to an interior point in the U.S. by land and sea, using three different modes of transportation: truck, steamship, and railroad. To cover the end-to-end transportation services required, ICC issued the standard

FIATA Multimodal Transport Bill of Lading (FBL), one of the most widely-used multimodal transport documents throughout the world. The FBL was designed by FIATA, with the assistance of a committee of international legal experts (including representation from TIA), as a standard, easily-recognizable document of transport to be used by freight forwarders when they are acting as "principal" or "carrier." The standard trading conditions printed on the back of every FBL state that the term "freight forwarder" as used in the document "means Multimodal Transport Operator who issues this FBL and is named on the face of it and assumes liability for the performance of the multimodal transport contract *as a carrier*." J.A. 85 (emphasis added).[3] FIATA's instructions accompanying the standard form in FIATA's *Documents and Forms* brochure state in relevant part:

> The FIATA Multimodal Transport Bill of Lading (FBL) is a carrier-type transport document set up by FIATA for the use by freight forwarders acting as multimodal transport operators (MTO).
>
> • • •
>
> The document is negotiable unless marked "non-negotiable." It has been deemed by the International Chamber of Commerce (ICC) to be in conformity with the UNCTAD/ICC Rules for Multimodal Transport Documents published by ICC in its brochure No. 481. Therefore, the FBL bears the ICC logo alongside the symbol of the national freight forwarders association.
>
> • • •
>
> A freight forwarder acting as Multimodal Transport Operator (MTO) or marine carrier issuing a FBL is responsible for the performance of transport. The freight forwarder does not only assume responsibility for

[3] The full text of the standard conditions can be found in the Joint Appendix at 85-99.

> delivery of the goods at destination, but also for all carriers and third parties engaged by him for the performance of the whole transport.
>
> * * *
>
> Freight Forwarders issuing FBLs have to insure their liability in accordance with the FBL conditions.

The FBL is copyrighted. Its distinctive blue front, and the FIATA logo prominently printed in the center, are designed to make it easily recognizable by bank letter of credit departments as a negotiable transportation document under the commonly used International Chamber of Commerce rules.

The FBL is also an insured document, as the excerpt from the FIATA brochure indicates. TIA and the other FIATA national associations have entered into licensing agreements with FIATA that require them to regulate the use of the document by their member companies. A member company desiring to use the FBL must first submit proof to the national association that it carries liability insurance to cover its carrier obligations under the bill of lading. Numbered copies of the document are then assigned to the forwarder, and it must agree that it will not permit any other company to use the documents assigned to it.

Thus, the customer receiving the FBL is assured that the forwarder, acting as carrier pursuant to the terms of the FBL, has insurance sufficient to cover any liability it may incur to the customer under the terms and conditions of the contract of carriage. Furthermore, the document contains two boxes on the front that may be filled in to guarantee a specified delivery date and to secure coverage for the full declared value of the goods being shipped.

B. Kirby and ICC Deliberately Chose Not to Create an Agency Relationship

The shipper and forwarder/carrier here had other choices that they chose not to exercise. For example, FIATA has made available to national association member companies another form, known as the Forwarders Certificate of Transport (FCT), that specifically disclaims carrier status by the forwarder, and simply authorizes the forwarder to arrange for the underlying transportation of the goods. That document also provides that insurance will be effected only upon express instructions in writing from the shipper. Thus, under the terms of the FCT, the forwarder does not assume liability as a carrier.

By selecting the FBL, rather than the FCT, the parties made a conscious choice to require the forwarder to assume the responsibilities and liabilities of a carrier, not an agent. As the court below correctly held:

> [I]n receiving ICC's bill Kirby did not engage ICC as its agent, but instead hired ICC as a principal carrier to perform the transport, which ICC in turn sub-contracted to Hamburg Sud.
>
> * * *
>
> In the present case, there were no "special particular arrangements" between Kirby and ICC indicating "exclusivity and control" characteristic of an agency relationship. Instead, Kirby and ICC conducted their transaction on the basis of a form bill, a form bill which, as we have noted, was specifically intended to clearly establish that the freight forwarder, ICC, was *not* the agent of the shipper, Kirby.

James N. Kirby, Pty Ltd. v. Norfolk Southern Railway Company, 300 F.3d 1300, 1306 (11th Cir. 2002), Pet. App. 9a-10a (emphasis in original). This Court should not override the choice of the parties and attribute agency status where

both the intermediary and its customer chose to have the freight forwarder accept responsibility as a carrier. That practical choice here to make ICC the "carrier" established an independent contractor relationship between ICC and Kirby.

C. The FMC Recognizes the Practical Distinction Between an Independent Contracting "Carrier" and an Agent

The Federal Maritime Commission (FMC) and the Congress have recognized that an intermediary may assume responsibilities as carrier (or as agent) depending upon the commercial needs of the parties. As long ago as 1952, the FMC held that it was not necessary for a transportation provider to own or operate a vessel to be considered a carrier. *Bernhard Ulmann Co., Inc. v. Porto Rican Express Co.*, 3 FMB 771 (1952). The FMC's view was later codified in the Shipping Act of 1984, as amended (Shipping Act), which currently defines a non-vessel-operating common carrier as a "common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier." 46 App. U.S.C. 1702(17)(B).

A Court-imposed rule attributing agency status to a common carrier that does not operate a vessel would complicate the widespread understanding of the meaning of key statutory terms. "Common carrier" is defined in the Shipping Act as "a person holding itself out to the general public to provide transportation by water of . . . cargo between the United States and a foreign country for compensation that—(A) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and (B) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country . . . ." 46 App. U.S.C. 1702(b). According to this definition, it is

not the ownership or operation of a vessel that makes one a carrier—it is the holding out to transport the goods, the assumption of responsibility to do so, and the *use* of a vessel operating between the U.S. and a foreign port to move the cargo. The statute does not make an NVOCC any less a "common carrier," much less an agent of the shipper, because it uses the vessels of underlying steamship operators to transport its customers' cargo.[4]

The statute does not mention agency, for a very good reason. Congress recognized the commercial reality that free market actors such as intermediaries, who are willing to accept a carrier's liabilities and responsibilities, do not necessarily need to own carriage assets to do so. Although many intermediaries do own trucks and other small vehicles to transport goods to larger carriers, such as vessels and trains, the requirement of "ownership" (or even "operation") of such a vehicle is not a prerequisite to status as a "carrier."

By binding an intermediary's shipper customers to contracts with the underlying service providers engaged by an intermediary when the intermediary acts as a carrier, this Court would create grave uncertainty as to the legal status of an intermediary's contracts. It would also complicate unnecessarily the contractual duties owed to shippers, because by definition the normal common law independent contractor duties, spelled out in the FBL or other contract of carriage, would be supplemented or displaced by U.S. federal common law of agency. The resulting uncertainty would make it almost impossible for a shipper or carrier to determine where one party's rights and duties end and those of the other begin.

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[4] Indeed, to rationalize service and maximize space utilization, most vessel operating common carriers participate in vessel sharing agreements (VSAs) with their competitors. Any given shipments, such as those at issue here, might be booked by one carrier but moved on another carrier's vessel. In practical effect, under such circumstances the booking carrier is no different than a NVOCC.

Petitioner and WSC have suggested that the Court should hold the shipper to the limitations of liability in the ocean carrier's bill of lading, and attribute to the intermediary the status of shipper's agent, even if the intermediary's contract with its customer provides otherwise. In effect, these parties are asking the Court to assume that all intermediaries are agents, and to make it impossible for an intermediary to contract out of that status. TIA urges the Court not to create a new rule of law that would strip intermediaries of the freedom to structure their contractual relationships as they and their customers see fit.

II. A RULING IN NORFOLK SOUTHERN'S FAVOR WOULD DISRUPT COMMERCIAL EXPECTATIONS AND RELATIONSHIPS IN THE $80 BILLION INTERMEDIARY INDUSTRY

The potential of such a holding to disrupt and confuse the industry served by TIA would be enormous. Set forth below are the main categories of intermediary who belong to TIA, and the types of services they offer. All of them have carefully calibrated forms and contracts that delineate their roles and responsibilities vis a vis their customers.

1. Motor Carrier Property Brokers

Motor carrier brokers of property ("property brokers") are licensed and bonded by the U.S. Federal Motor Carrier Safety Administration (FMCSA) of the Department of Transportation (DOT). They arrange for both full truckload and less than truckload movements of cargo by matching available freight with available capacity (or vice versa). Many have standing contracts, including negotiated rates, with a range of motor carriers, and they can offer shippers a variety of rate levels and service options. They range from small, family-owned businesses to multi-billion dollar, publicly traded companies. Motor carrier property brokers are

not required to assume responsibility for the cargo and so are most akin to ocean freight forwarders, but they may assume such responsibility by contract.

2. Surface Freight Forwarders

Surface freight forwarders are registered by FMCSA and must maintain certain minimum levels of cargo and third party liability insurance. They arrange for transportation by truck within the United States, and between the U.S., Mexico, and Canada. Unlike property brokers, surface freight forwarders always act as carriers in their dealings with shippers, and accept primary responsibility for any loss or damage to the cargo. They are, therefore, most akin to non-vessel-operating common carriers.

3. Intermodal Marketing Companies

Intermodal marketing companies ("IMCs") are not subject to federal regulation. They typically hold discounted volume contracts with the railroads to haul containers or trailers on defined routes, and they resell that space to shippers, property brokers, freight forwarders, or motor carriers.

4. Third Party Logistics Companies

Third party logistics companies are unregulated supply chain specialists who negotiate transportation arrangements for shippers, but do not make the actual arrangement. They may provide consulting services for shippers as part of a larger warehousing and distribution function.

5. Ocean Transportation Intermediaries

Ocean transportation intermediaries in the United States are licensed and bonded by the Federal Maritime Commission. They include *ocean freight forwarders* who arrange export transportation movements by booking shipments with the underlying ocean carriers (a function analogous to the motor carrier property broker), and *non-vessel-operating*

common carriers ("NVOCCs") who arrange for both export and import ocean transportation and act as carriers by accepting responsibility for the safe transportation of the cargo (similar to the surface freight forwarder for land movements).[5]

6. Air Freight Forwarders

Air cargo agents, approved by the air carriers, and air freight forwarders, registered with DOT, perform similar intermediary functions for air shipments: the air cargo agent is strictly an arranger of air transportation, while the air freight forwarder not only arranges transport, but accepts primary responsibility as if it were the carrier responsible for the goods.

As this list demonstrates, the issue of agency arises in many different contexts throughout this complex and highly specialized industry. TIA members regularly deal with claims based on alleged vicarious liability for third party injuries sustained in transportation-related accidents; claims by motor carriers against TIA member customers for unpaid freight charges; and allegations that fiduciary responsibilities have been breached. TIA also has a hearing process under its Code of Ethics for complaints against member companies. These disputes, like the one at issue in this appeal, are complex and document intensive. They require close analysis of the contractual relationships between the parties, and of the

[5] Foreign NVOCCs that do not have any operations in the United States are not required to obtain a license, but must post a $150,000 bond and publish a publicly available rate tariff. NVOCCs with U.S. operations must obtain a license from the FMC, post a $75,000 bond, and publish a tariff. Foreign NVOCCs are required to use only FMC licensed freight forwarders or U.S. NVOCCs as their origin or destination-handling agents in the United States.

shipment documentation itself.[6] A holding from this Court that the terms of those contracts and documents are not binding (or binding even on non-parties), and that intermediaries may be held to agency status and responsibilities even when they are acting as carriers or independent contractors, has the potential to introduce an element of chaos into this intricate web of finely-calibrated business relationships.

That chaos, in turn, would affect the entire carriage of goods industry. Shippers benefit from the wide range of transportation and logistics choices that intermediaries can provide. A decision against Kirby in this case would run a substantial risk of upsetting the market-oriented solutions that have evolved over the last few decades.

Therefore, TIA urges the Court to affirm the holding below and find that ICC was acting solely as a carrier, and not as the shipper's agent, when ICC issued its bill of lading for the shipments at issue in this case, and that Kirby therefore is not bound to the terms of the subcontract that ICC entered into with Hamburg Süd.

[6] TIA's Ethics Committee recently spent many hours deliberating the merits of and documentation underlying a three-part $400 claim before issuing a written decision, because of the precedent it would set for best practices standards in the industry.

CONCLUSION

The decision below on the first question presented should be affirmed.

Respectfully submitted.

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On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF *AMICUS CURIAE* TRANSPORTATION LOSS PREVENTION AND SECURITY ASSOCIATION IN SUPPORT OF PETITIONER NORFOLK SOUTHERN RAILWAY COMPANY

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QUESTIONS PRESENTED

1. Whether a cargo owner that contracts with a freight forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with the carriers that actually transport the owner's goods.

2. Whether the phrase "person (including any independent contractor) whose services have been used in order to perform the contract" in a freight forwarder's multimodal bill of lading covers truckers that actually transport the goods to their inland destination, regardless of whether the trucker is in privity with the freight forwarder.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 the Transportation Loss Prevention and Security Association states that it is a non-profit corporation incorporated in New Jersey. Its shares are not traded.

STATEMENT OF CONSENT

The parties have consented to the filing of this brief.

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BRIEF OF *AMICUS CURIAE*[1] TRANSPORTATION LOSS PREVENTION AND SECURITY ASSOCIATION IN SUPPORT OF PETITIONER NORFOLK SOUTHERN RAILWAY COMPANY

RELEVANT FEDERAL STATUTES

The Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. 14706.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Transportation Loss Prevention and Security Association "TLPSA" is a non-profit corporation incorporated in the State of New Jersey. It is comprised of over sixty-five member organizations which are involved in the trans-

[1] No other person or organization made a monetary contribution to the preparation of this brief

portation of freight by truck within the United States. Members include trucking companies, large and small, some with revenues upwards of $2.5 billion. Its mission as stated in its bylaws is to:

> (1) provide continuing professional education to cargo claims professionals and their insurers, cargo security professionals, and law enforcement; (2) facilitate practical and effective communications between carrier and insurance personnel and law enforcement; (3) engage in legal and legislative advocacy on behalf of the membership.

A majority of its members transport freight to and from domestic locales as a component of continuous through movements in international transportation. As such, they frequently transport freight subject to ocean bills of lading which include Himalaya clauses as well as clauses Paramount. Consequently they are similarly situated to Norfolk Southern Railway Company ("Norfolk Southern"). In fact, it is merely an accident of circumstance that a railroad rather than a trucker was retained to carry the freight in this controversy. Had the freight been bound for a town not served by a rail line, it would have been trucked. In addition, Norfolk Southern was only dispatched to deliver the freight to its rail ramp in Huntsville, Alabama. The ultimate destination was Athens, Alabama, thirty miles west, to which the freight would have eventually been short hauled by a trucker.

Constituents of TLPSA include small trucking companies, which, unlike Petitioner Norfolk Southern do not have the financial wherewithal to absorb a $1.5 million judgment. Claims of such magnitude would force numerous truckers out of business. It is the considered opinion of TLPSA not only that the Eleventh Circuit decision is in error, but that if it remains intact it will have a chilling effect upon the willingness of trucking companies to accept import and export freight, in contravention of established public policy.

SUMMARY OF ARGUMENT

Any decision affecting the effectiveness of limitations of liability in an ocean carrier's bill of lading insofar as it affects the liability of railroads will necessarily have a similar impact upon the liability exposure of the trucking industry; an industry which constitutes a more significant component of the national economic infrastructure than do railroads.

The ultimate outcome of the 11th Circuit's decisions will be to discourage truckers both large and small from accepting imported freight. Any such outcome is counter to and destructive of well settled public policy ensconced in the Interstate Commerce Act, 49 U.S.C. 101, *et seq*. Specifically, if the decision below is affirmed it will: (1) chill entrepreneurship by impeding the viability of small trucking companies; (2) subject this vital component of the infrastructure to catastrophic liability exposure; and (3) discourage the use of transportation intermediaries, essential to the deregulated transportation environment.

ARGUMENT

I. PUBLIC POLICY ENCOURAGES THE PROLIFERATION OF SMALL, PRIVATELY OWNED TRUCKING COMPANIES

In 1935 Congress adopted the Motor Carrier Act which placed the motor carrier industry under the heavy hand of the erstwhile Interstate Commerce Commission ("ICC" or "the Commission"). Market entry was restricted, rates were subject to regulatory review and competitor protest, and routes were confined to those expressed within the carrier's operating authority issued by the Commission.

Prodded by the government as well as the general public, the Commission began to unshackle the transportation industry in the 1970's. In 1980 Congress adopted a new Motor Carrier Act mandating further deregulation.

During the period between 1980 and 1995, Congress enacted a series of laws which completely overhauled the regulatory scheme. These enactments were designed to achieve various goals including: (1) to deregulate the trucking industry and subject it to market-driven forces; (2) to further integrate the national transportation network by eliminating state government regulation of motor carriers; and (3) to encourage entrepreneurship by making it easy for individual truckers to own their own independent companies. This last goal represented a deliberate policy decision not only to spur entrepreneurship for its own sake, but also to encourage the proliferation of minority-owned businesses, which could avail themselves of federally-mandated set-aside programs.[2]

Passage of the Motor Carrier Act of 1980 resulted in a boom of small operators entering the field. Between 1980 and 1995, the number of federally-licensed motor carriers swelled from 14,000 to over 55,000. (1994 U.S. Code and Administrative News, p. 804; 104 Congr., 1st Sess. 1995.)

II. PUBLIC POLICY HAS ALWAYS FAVORED A RISK ALLOCATION REGIME WHICH MAKES CARRIERS STRICTLY LIABLE FOR COMMONPLACE LOSSES, BUT SHIFTS THE BURDEN FOR EXTRAORDINARY LOSSES TO SHIPPERS' INSURERS.

At common law, a carrier was strictly liable for the full actual value of cargo damaged in its care. This principal was codified by the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. §14706 (previously 49 U.S.C. 11707 and 49 U.S.C. 20(a).) However, a longstanding exception to the full value rule has been found in what is

[2] *See* Thoms, William E.: "Rollin' On . . . To A Free Market. Motor Carrier Regulation 1935-1980." 13 Transportation Law Journal 43, 72, 76, 84 (1983).

alternatively known as the declared value, or released rates doctrine. As this Court stated long ago:

> There is no justice in allowing a shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a lesser sum than that claimed after loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier.

Hart v. Pennsylvania Railway Co., 112 U.S. 331, 340 (1884).

The Carmack Amendment to the Interstate Commerce Act, as modified by the Cummins Amendment of 1916, specifically provided that carriers could offer a menu of published discount rates provided that the shipper was willing to accept a limited liquidated cap on the carrier's liability. The inherent equities of this arrangement have long been lauded by this Court:

> The underlying principle is that the carrier is entitled to base rates upon value and that its compensation should bear a reasonable relation to the risk and responsibility assumed. The broad purpose of the federal act is to compel the establishment of reasonable rates and to provide for their uniform application.

Southeastern Express Co. v. Pastime Amusement Co., 299 U.S. 28, 29; 57 S.Ct. 73; 81 L.Ed. 20 (1936). *Accord*: *Missouri, K&T.R. Co. v. Harriman Brothers*, 227 U.S. 657 (1913).

In 1919, the Interstate Commerce Commission prescribed the Uniform Domestic Bill of Lading which featured a block requiring shippers to declare the value of their freight when the rate paid was based in part on the freight's value. *In Re: Bills of Lading*, 52 I.C.C. 671 (1919).

In 1977 the I.C.C. promulgated Released Rates Order No. MC 894, 353 I.C.C. 661 (1977), which endorsed the practice of carriers establishing by tariff rule that a shipper's omission to declare the value of its freight automatically resulted in the freight being transported at the lowest rate along with the concomitantly lower limitation of liability. The petitioner in that proceeding was a major shipper, IBM, which was having trouble distributing high-value mainframe computers because carriers were reluctant to haul such expensive merchandise. That decision crystalized the overriding policy rationale supporting the limited liability regime. In order to protect motor carriers from catastrophic losses, and to allow shippers the flexibility to manage their risk as they see fit, the I.C.C. ordained a liability regime which shifted the burden for extraordinary losses to private insurers whose premium pool was far more widespread. Despite ample opportunities for legislative reexamination [3], limitations on carrier liability for extraordinary losses remain the rule. This is consistent with other modes of transportation in which limitations of liability are ubiquitous.

The liability of ocean carriers is limited by statute to $500 per shipping unit. Carriage of Goods by Sea Act, 46 U.S.C. §1304(5). Limitations of liability in the volume transportation contracts of railroads are routinely upheld. *Cooperative Shippers, Inc. v. Atchison, Topeka & Santa Fe Railway Company*, 840 F.2d 447 (7th Cir. 1988). The liability of international air carriers is limited by treaty to the sum of $9.07 per pound. 49 U.S.C. §40105.

[3] Motor Carrier Act of 1980, Pub.Law. 96-296 94 Stat. 793; Trucking Industry Regulatory Reform Act of 1994 Pub. Law. 103-311, 108 Stat. 1683 (1994); Interstate Commerce Commission Termination Act of 1995, Pub.Law. 104-88, 109 Stat. 903 (1995).

III. PUBLIC POLICY ENCOURAGES THE PRESENCE OF TRANSPORTATION INTERMEDIARIES

In the new deregulated environment matching freight with a carrier suitably situated to haul it is a much more haphazard and frenetic enterprise. Among the sidebar consequences of this sea change is the massive proliferation of transportation intermediaries who run the gamut from brokers who mix and match shippers with carriers, sometimes with the benefit of little more than a personal computer and a telephone, to third party logistics providers which operate as outsourced traffic departments for large companies.

The I.C.C. recognized and accommodated this shift in the marketplace by promulgating *Ex Parte* No. MC-96 Entry Control of Brokers 126 MCC 476 (1977), which loosened entry restrictions on brokers.

Over the course of the past decade countless intermediaries have entered the marketplace. The Transportation Intermediaries Association, for instance, was nonexistent until 1996, and now boasts over eight hundred active members. In 1980, Congress repealed the prohibition against motor carriers holding dual authority as both carriers and brokers. It is now not only common for freight to be brokered, it is downright common for freight to be rebrokered from entity to entity until a suitable empty truck can be found in the vicinity of the freight heading in the same direction in which the freight is bound.

IV. THESE PUBLIC POLICY GOALS WILL BE SEVERELY UNDERMINED IF THE LOWER COURT'S RULING IS AFFIRMED

Small truckers, who comprise an ever larger segment of the trucking market are required by law only to carry cargo insurance of $10,000 per occurrence. 49 C.F.R. 387.303(c).

This is consistent with the economic reality that ninety percent (90%) of all freight that moves is worth less than $10 a pound. U.S. Department of Transportation Cargo Liability Study, August 1998, p.26.

These small truckers have been advised by this Court since *Kansas City Southern Railway v. Carl*, 227 U.S. 639 (1912), that they can avail themselves of whatever limitation of liability has been agreed to by an earlier, upstream carrier. They have also been advised by this Court since *Great Northern Railway v. O'Connor*, 232 U.S. 508 (1914), that whatever limitation of liability is negotiated by an intermediary is binding on the shipper. The Eleventh Circuit has deviated from these lines of precedent which form the legal pillar upon which carriers have always relied.

Asking truckers to accept any type of cargo without availing themselves of the limitations of liability in place for the prior carrier would essentially ask them to purchase a pig in a poke. The freight on board could be anything from abacuses to zippers, and without the prior limitations on liability truckers would have to carry over $1,500,000 in insurance coverage to protect themselves against catastrophic losses like that here. No small transportation company has that kind of coverage, in no small measure because they are mindful of, and rely upon, the ocean carriers' $500 per package limitation of liability. If this Court affirms the decision below, local draymen, regional carriers, and other small truckers integral in completing the last leg of most import transportation would simply refuse to carry freight, and inbound commerce would grind to a halt.

It is also neither plausible nor possible to expect shippers and carriers to negotiate freight rates and insurance coverage every time someone needs a truck, especially when the cargo originates overseas and arrangements are made by a third party. The nature of freight distribution depends heavily on the flexibility provided by the vast range of carriers and types

of service. Just-in-time shipping and expedited distribution services require the interchangeability of equipment and companies to meet whatever the current need may be. Expecting the parties to stop all shipping operations every time a substitute carrier is used, or every time there is a change in a distribution plan, runs counter to the transportation policy and will have a devastating effect on the supply chain.

The National Transportation Policy, first enacted in 1940 and now codified at 49 U.S.C. §13101(a)(2), seeks to encourage reasonable rates, efficiency, service to small towns, profitability, and further seeks to promote inter-modalism. The Eleventh Circuit's view will only promote higher freight rates and service shortages.

This policy will be completely undermined if the lower Court's decision is affirmed. The pool of transportation providers will be severely reduced, and the field will be limited only to large carriers with high risk reserves or small carriers cavalier enough to transport loads too valuable for them to assure against loss.

CONCLUSION

Amicus Curiae respectfully request that the decision of the 11th circuit be reversed.

Respectfully submitted,

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(13)

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IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY PTY LIMITED, D/B/A KIRBY ENGINEERING AND ALLIANZ AUSTRALIA LIMITED,
Respondents.

On Writ of Certiorari to the United States Court Of Appeals for the Eleventh Circuit

BRIEF OF THE WORLD SHIPPING COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE WORLD SHIPPING COUNCIL

The World Shipping Council ("WSC") is a non-profit association of thirty companies that operate forty-four international shipping lines.[1] WSC's members include the full spectrum of vessel-operating ocean common carriers, offering containerized, roll-on/roll-off, car carrier, and other inter-

[1] In accordance with the Court's Rule 37.6, WSC and its counsel certify that no counsel for a party authored this brief in whole or in part and that no person or entity other than WSC and its members made any monetary contribution to the preparation or submission of this brief.

national cargo transportation services. WSC's members carry more than ninety percent of the United States' imports and exports transported by the international ocean liner shipping industry, an industry that moves just under $500 billion worth of America's foreign commerce each year.[2] Most of this cargo moves in sealed intermodal freight containers.

Approximately twenty-five percent of the containerized cargo moving in United States foreign commerce involves the participation of non-vessel-operating common carriers ("NVOCCs").[3] A significant number of all containers that move into and out of the United States each year are carried under "through" bills of lading of the type at issue in this case. Under a through bill of lading, the vessel operating carrier arranges and undertakes the transportation responsibility for the entire movement of the cargo, including necessary inland legs of the transportation.[4] Vessel operators fulfill the inland transportation component of a through move in the majority of cases by contracting with railroads or trucking companies or both to provide those inland services. Vessel operators also routinely contract for terminal, stevedoring, warehousing, and other logistics and cargo handling services.

Because a substantial amount of the containerized cargo moving into and out of the United States involves the participation of NVOCCs and further involves movement on

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[2] *See* U.S. Army Corps of Engineers U.S Foreign Waterborne Statistics, *Preliminary U.S. Foreign Waterborne Cargo Summary – November 2003* (visited March 18, 2004) <http://www.iwr.usace.army.mil/ndc/usforeign/pcsnov2003.htm>.

[3] *See* Federal Maritime Commission, *The Impact of the Ocean Shipping Reform Act of 1998*, 84 (2001) (discussing NVOCC numbers in context of service contract participation).

[4] An NVOCC might also issue a "through" bill of lading (as happened in this base), but even when the NVOCC issues a through bill, it is virtually always the vessel operator that actually arranges for the inland portion of the through transportation.

through bills of lading, the outcome of this case will have a substantial impact on the ability of vessel operators to structure their relationships with the other transportation providers that ocean carriers employ to provide through transportation. Specifically, unless this Court rejects the Eleventh Circuit's holding that an NVOCC is not the agent of its shipper customer when the NVOCC arranges with a vessel operating carrier to provide through transportation for the shipper's cargo, companies that provide services to vessel operators will not be able to continue to rely on the liability protection that they have today through the Clause Paramount and Himalaya clause provisions of the vessel operators' bills of lading. The inability of terminal operators, stevedores, railroads, and truckers to rely for NVOCC shipments on liability limits authorized by the Carriage of Goods By Sea Act, ch.229, 49 Stat 1207 (1936) ("COGSA"), codified at 46 U.S.C.App. 1300 *et seq.*, and incorporated in the vessel-operating ocean carrier's bill of lading, would leave these U.S. companies exposed to cargo damage claims with no liability limits. In turn, this would cause widespread uncertainty and an unwillingness of domestic vendors to accept international cargoes absent a disruptive, unnecessary, and expensive restructuring of the rate structures and insurance arrangements that currently govern through transportation.

STATEMENT

A. International Intermodal Transportation and the Effect of the Decision of the Court of Appeals.

As is described in some detail in the briefs of *amici* the United States and the Association of American Railroads filed at the petition stage, international ocean transportation of containerized cargo on a "through" or inland-point-to-inland-point basis requires the cooperation of numerous service providers. Sequentially transferring a sealed cargo

container from one mode of transportation to another[5] in order to move it over roads, oceans, and rails in delivering goods from one place to another is simple in concept. However, it is somewhat more complicated in actual operation. Containers of goods do not spontaneously appear at seaports and load themselves onto ships; neither do they unload themselves at the destination port and make their way unaided to their intended recipients. In order for a shipment to make its way from—as in this case—an inland point in Australia to an inland point in the United States, numerous modes of transportation must be employed, and someone must transfer the container from one mode to the next at each stage in its journey.

Depending on the distance from the origination point to the seaport, the cargo might move by truck, rail, or a combination of the two before being loaded on a ship. As each stage in the transportation occurs, the cargo must be physically transferred from one mode to the next, a task that is simplified by containerization. At the seaport the container must be unloaded from its last land conveyance and hoisted aboard ship. At the arrival port, the process is repeated until the cargo is ultimately delivered to the door of the business or individual that is to receive the goods.

Each step in this multi-step process must be scheduled and paid for by someone. Because of the complexities of coordinating all of the inland carriers, terminal operators, and stevedores that must necessarily handle the cargo if it is to get from point A to point Z, shippers, whether they are cargo owners like Kirby or intermediaries like ICC, often request the ocean carrier, which has contacts and relationships in the

[5] It is this aspect of the combination of various modes of transportation such as ocean vessel, rail, and truck that has spawned the terms "intermodal" and "multi-modal" that are used to describe the multi-stage transportation arrangements that are often made for both domestic and international cargoes.

countries on both ends of each of its ocean routes, to arrange for through transportation. Tasking a single entity that has an international presence with the hiring and coordination of the various individual transportation and cargo handling entities that must take possession of the cargo makes possible timely and uninterrupted shipment of thousands of containers daily.

The business and logistics skills of the vessel operator are obviously essential to arranging successful international, intermodal transportation. The other necessary ingredient for maintenance of a successful international transportation system is the ability of the entity coordinating the multiple players in that system—the vessel operator—to be able to manage its risk, including the risk to its contractors. It is to that essential ingredient that this case speaks. The defendant here is a railroad that was hired by the vessel operator, which offered a through bill of lading to an intermediary. If the railroad in this case is not allowed to limit its liability on the grounds that the vessel operator's Himalaya clause does not apply to the transportation provided by the railroad, it takes little imagination to foresee that railroads in the future could decline such shipments, increase rates dramatically, or require substantial indemnifications before accepting cargo from vessel operators in instances where the cargo was tendered to the vessel operator by an NVOCC. The same is true of truckers, stevedores, terminal operators, and other vendors that provide services necessary to complete a through intermodal move. Until *Kirby* was decided by the Eleventh Circuit, these entities understood that their liability was limited by the application to inland activities of the COGSA limits in the bill of lading issued by the vessel operator that hired each of the necessary service providers in the intermodal chain.

Each of the negative effects that would flow from the court of appeals' ruling is contrary to the goals of stability, uniformity, and predictability that COGSA was designed to

provide. That the ruling below is contrary to COGSA is more specifically demonstrated by its relative impacts on vessel operators and NVOCCs. Under that ruling, vessel operators, which are the entities that actually provide the services ("loading, handling, stowage, carriage, custody, care, and discharge") that section 1302 of COGSA makes subject to the statutory duties and protections of COGSA, would not by any act of their own be able to extend liability protection to their contractors if an NVOCC tendered the cargo. This would be so because the rationale of the ruling below is that the shipper is a stranger to the terms and conditions set forth in the vessel operator's bill of lading, notwithstanding that the only way that shipper's cargo will ever reach its destination is through the services provided by that vessel operator. [6] No drafting device by the vessel operator could overcome that rationale. In contrast, NVOCCs under the appeals court ruling can limit liability both for themselves and for any downstream contractors by properly wording their bills of lading. This stands the statute on its head. The party (the vessel operator) that provides the enumerated services that could give rise to the very liability that the statute allows to be limited is cut off from the statute's protection, but a party (the NVOCC) that never touches the cargo and that provides none of the services described by the statute has full access to the law's protection. It is most implausible that such a result was intended by Congress.[7]

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[6] As we discuss in section III of the Argument, this aspect of the Eleventh Circuit's decision contradicts that same court's reasoning in *Polo Ralph Lauren L.P. v. Tropical Shipping & Constr. Co.*, 215 F.3d 1217 (11th Cir. 2000), in which the court held that a company that owned the damaged goods but that was not listed as shipper on the carrier's bill of lading could bring an action under COGSA directly against the carrier because the standard language on the carrier's bill of lading identified the cargo owner as a party to that bill of lading.

[7] COGSA's definition of "carrier" states that the term "includes the owner or the charterer who enters into a contract of carriage with a shipper." 46 U.S.C.App. § 1301. If it were held that the vessel operator's bill of lading was not applicable to bind the shipper whose cargo is on the vessel operator's ship for COGSA purposes (the outcome below), that would mean that the execution of a private contract between an NVOCC and a shipper could by itself oust the "owner or charterer" (i.e., the vessel operator) from COGSA coverage. WSC knows of no ruling of this Court that would allow a federal statute to be vitiated by private contract in this manner.

B. Regulatory Background.

In addition to the factual and practical background described immediately above, there is a regulatory background that is relevant to the issues presented. The Shipping Act of 1984, as amended, 46 U.S.C.App. §§ 1701-1719, regulates the commercial relationships among vessel operators, NVOCCs, freight forwarders, and shippers. The Federal Maritime Commission, the federal agency that implements the Shipping Act, has expressly stated that its authority does not extend to substantive questions under COGSA. In *Definition of "Package" Under the Carriage of Goods by Sea Act*, 23 Shipping Reg. (P&F) 111 (Fed. Maritime Comm'n 1985), the Commission held that it had no authority to promulgate regulations regarding the substance of bills of lading, stating that COGSA is "a separate body of law governing shipowner rights and obligations which is subject only to court interpretation. . . ." *Id.* at 113. Although the Shipping Act and COGSA exist separately, with neither operating directly to affect the terms of the other, the requirements of the Shipping Act are nonetheless relevant to a proper understanding of the roles of vessel operators, NVOCCs, freight forwarders, and shippers.

The Shipping Act differentiates between an "ocean common carrier," which "means a vessel-operating common carrier," and a "non-vessel-operating common carrier" (NVOCC), which "means a common carrier that does not operate the vessels by which the ocean transportation is

provided, and is a shipper in its relationship with an ocean common carrier." 46 U.S.C.App. § 1702(16) and (17)(B). Because the Shipping Act (which is an antitrust, economic regulation, and anti-discrimination statute) and COGSA do not have overlapping jurisdiction, and the definitions in the Shipping Act are in any event silent on the agency issue before the Court, the Shipping Act does not shed any direct light on that issue. That said, the Shipping Act is relevant because it imposes certain requirements on vessel operators ("ocean common carriers" under the Shipping Act) that govern their relationships with NVOCCs and with the customers of NVOCCs.

The first aspect of the Shipping Act that is relevant here is the concept of common carriage. Both "ocean common carrier[s]" (vessel operators) and NVOCCs fall within the term "common carrier," which the Shipping Act defines in relevant part as "a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation . . . ." 46 U.S.C.App. § 1702(6). Although the traditional scope of common carrier obligations has been curtailed to some extent by amendments to the Shipping Act enacted in 1998,[8] it remains unlawful for any common carrier to "unreasonably refuse to deal or negotiate," 46 U.S.C.App. § 1709(b)(10). Accordingly, common carriers under the Shipping Act are not permitted the same latitude that participants in unregulated industries have to decide not to deal with a potential customer for any reason or no reason at all. *See, e.g., United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (trader or manufacturer may generally "exercise his own independent discretion as to parties with whom he will deal."). Thus, while it might be held in the future to be reasonable for a vessel operator to refuse to deal with an

[8] *See* The Ocean Shipping Reform Act of 1998, P.L. 105-258, 112 Stat. 1902.

NVOCC if to do business with that NVOCC would subject the vessel operator or its contractors to unlimited liability, the understanding for now is that vessel operators are under certain obligations within the bounds of reason to accept cargo from NVOCCs. Accordingly, it is not a realistic answer to the risks imposed by *Kirby* to say simply that a vessel operator may choose not to deal with NVOCCs. In any event, that hardly seems a desirable result, since for vessel operators to cease providing services to NVOCCs would by definition put NVOCCs out of business.

There is an additional Shipping Act requirement that is perhaps more directly relevant to the agency issue before the Court. The Shipping Act provides that:

> Except with regard to bulk cargo, forest products, recycled metal scrap, new assembled motor vehicles, waste paper, and paper waste, each common carrier and conference shall keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules and practices between all points or ports on its own route and on any through transportation route that has been established. However, common carriers shall not be required to state separately or otherwise reveal in tariffs the inland divisions of a through rate. The tariffs shall—
>
> . . .
>
> (E) *include sample copies of any bill of lading*, contract of affreightment, or other document evidencing the transportation agreement; . . . .

46 U.S.C.App. § 1707(a)(1)(emphasis added). 46 U.S.C.App. § 1707(a)(2), in turn, provides that: "Tariffs shall be made available electronically to any person, without time, quantity, or other limitation, through appropriate access from remote locations, and a reasonable charge may be assessed for such access. No charge may be assessed a Federal agency for such access."

In addition to being required to make their tariffs public and accessible and to include a copy of the bill of lading in the tariff, common carriers under the Shipping Act are required to follow those published tariffs. 46 U.S.C.App. § 1709(b)(2) provides in relevant part that no common carrier may "provide service in the liner trade that—(A) is not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under section 8 of this Act. . . ." The mandatory tariff publication requirements coupled with the requirement to provide service only in accordance with those tariffs means that the filed rate doctrine applies to transportation subject to the Shipping Act. *See, e.g., Stallion Cargo, Inc—Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act*, 29 Shipping Reg. (P&F) 665, 676 and n.24 (Fed. Maritime Comm'n 2001). Under the filed rate doctrine, a term that is required to be published in a tariff (like the bill of lading language required to be published by 46 U.S.C.App. § 1707(a) (1) (E)) has not just the force of contract, but the force of law. *See Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939). Moreover, the public is deemed to have notice of the terms of such tariffs; the shipper need not have knowledge of the terms to be bound. *See, e.g., Maislin Indus. v. Primary Steel*, 497 U.S. 116, 120 (1990) (shipper's ignorance not a defense to collection of filed rate).

SUMMARY OF ARGUMENT

WSC agrees with petitioner Norfolk Southern Railway Company ("Norfolk Southern") and *amici* the United States, the American Association of Railroads ("AAR"), and the P&I Clubs that the Eleventh Circuit erred in ruling that the Himalaya clause in the NVOCC's bill of lading was not sufficiently specific to extend COGSA's liability limitation to Norfolk Southern. The briefs of Norfolk Southern and supporting *amici* thoroughly address that point; WSC therefore does not brief that issue.

With respect to the first issue presented—whether the court of appeals erred in holding that the NVOCC did not act as the agent of the shipper so as to bind the shipper to the terms of the bill of lading issued by the vessel operator—WSC also supports reversal on that point.

By definition, non-vessel-operating common carriers do not own or operate vessels. They are therefore physically incapable of providing the transportation services that they sell to their shipper customers. Instead, NVOCCs buy transportation services from vessel operators and resell those services in turn to their own customers for a profit. The insertion of an NVOCC between the shipper and the vessel operating carrier does nothing to change the fundamental fact that it is the vessel operating carrier (and the inland transportation providers that the vessel operator hires for through transportation), not the NVOCC, that actually transports the cargo. In fact as well as in law, then, the role that the NVOCC plays is that of agent of the shipper for the purpose of obtaining transportation services from a vessel operator. Under this arrangement, the shipper and the vessel operator are the real parties in interest with respect to the contract for transportation that is evidenced by the bill of lading that is issued by the COGSA "carrier," i.e., "the owner or the charterer who enters into a contract of carriage with a shipper." 46 U.S.C.App. § 1301(a). As a party to that contract of carriage with the vessel operator, the shipper is bound by such Clause Paramount and Himalaya clause extensions of COGSA coverage as might appear in the vessel operator's bill of lading.

A central concern of the appeals court with respect to the agency argument appears to have been that the shipper did not have notice of the terms of the vessel operator's bill of lading. The filed rate doctrine's application to the vessel operator's bill of lading—including terms regarding through transportation as required by 46 U.S.C. § 1707(a)(1)—elim-

inates that issue, because the shipper (as well as the rest of the shipping public) is deemed as a matter of law to have knowledge of the terms of the vessel operator's published bill of lading terms, terms that by law must be applied.

In addition to conflicting with cases from other circuits on the issue of the NVOCC's role as the agent of the shipper, the decision below also conflicts with a prior decision of the Eleventh Circuit itself. That case was cited in the petition for rehearing and rehearing en banc filed with the court of appeals, but was not mentioned in the panel's decision. In *Insurance Co. of North America v. M/V Ocean Lynx*, 901 F.2d 934 (11th Cir. 1990), the court recognized, as a necessary predicate to its analysis, that a vessel-operating carrier would treat an NVOCC as the agent of the shipper. *Id.* at 937 n.2. Because the Eleventh Circuit's policy regarding circuit precedent is that a later three-judge panel may not disregard an earlier three-judge panel's decision, *see United States v. Lehder-Rivas*, 827 F.2d 682, 683 (11th Cir. 1987), the *Kirby* panel did not have the authority to overrule *Ocean Lynx*.

Although the issue has not been argued by the parties, the result that the shipper and the vessel operator are bound by the vessel operator's bill of lading in a transaction involving an intermediary NVOCC is also supported by appellate precedent holding that an owner of the goods was a direct party to the vessel operator's bill of lading by virtue of the broad wording of the term "Merchant" in the vessel owner's bill of lading. *See All Pac. Trading, Inc. v. Vessel M/V Hanjin Yosu*, 7 F.3d 1427 (9th Cir. 1993). The Eleventh Circuit relied on *All Pacific* in holding that an owner of lost cargo could sue the vessel operator directly as either a party to the bill of lading or as a third party beneficiary of the bill of lading even though the shipper named on the bill of lading was the cargo owner's bailee. *See Polo Ralph Lauren L.P. v. Tropical Shipping & Constr. Co.*, 215 F.3d 1217 (11th Cir. 2000).

ARGUMENT

I. ICC ACTED AS KIRBY'S AGENT FOR THE PURPOSE OF BINDING KIRBY TO HAMBURG SUD'S BILL OF LADING.

The decision below proceeds from an unexplained assumption that an NVOCC that acts as a common carrier[9] cannot also act as the agent of the NVOCC's customer for the purposes of binding that customer to the terms of the bill of lading issued by the vessel operating carrier that actually transports the customer's cargo. In its opposition to the petition for certiorari, Kirby echoed that reasoning, urging that the NVOCC's relationship to the shipper as nominal "carrier" makes the NVOCC a "principal" in relationship with the shipper. Petition in Opposition at 12 ("An entity cannot be a principal and an agent with respect to the same duties owed to the same parties at the same time."). However true the proposition about agents and principals might be as a general statement of law, it does not describe the situation here.

The fact that an NVOCC assumes contractual responsibility to the shipper for the performance of the transportation does not make him a "principal" with respect to all aspects of that transportation so as to preclude his being an agent with respect to other parts. He is a middleman, plain and simple, and both the NVOCC and the customer know from the outset that the NVOCC cannot *physically* provide the transportation that the NVOCC has *contractually* bound itself to procure. The parties thus enter into their agreement with full knowledge that the agreement can only be performed by someone else—the vessel operator and its

[9] Although there is much confusion in the record about whether ICC was acting as a "freight forwarder" or an NVOCC, WSC assumes that ICC was acting as an NVOCC, because there can be no real disagreement that a freight forwarder is an agent.

contractors and subcontractors. Notwithstanding that the NVOCC's contract with the shipper might (as is the case here) state that the NVOCC will procure such transportation "in his own name," J.A. at 86, it procures that transportation for the sole benefit of the shipper, because the NVOCC itself has no interest in the goods or their movement outside of the interest of its customer. To the extent that the NVOCC does not disclose the name of its customer to the vessel operator, that does not make the NVOCC any less of an agent; it simply becomes an agent for an undisclosed principal. That role as agent for an undisclosed principal is entirely consistent with the fact that the NVOCC is liable to the vessel operator for payment of freight and is also responsible to its principal, the shipper, to procure the contracted-for transportation. *See, e.g. Port Ship Serv. v. International Ship Management*, 800 F.2d 1418, 1420-21 (5th Cir. 1986) (agent of partially disclosed principal held liable).

To the extent that respondents rely on the Shipping Act's classification of NVOCCs as "common carriers" (and thus "principals" in relation to their customers), that reliance is unavailing for two reasons. First, NVOCCs are classified by the Shipping Act as "common carriers" in their dealings with their customers so that they can be brought under the Act's consumer protection provisions dealing with non-discrimination, tariff publication, refusals to deal, unreasonable practices, and the like. These concerns have nothing whatever to do with cargo liability concerns addressed by COGSA, as the Federal Maritime Commission has made clear. *See Definition of "Package" Under the Carriage of Goods by Sea Act*, 23 Shipping Reg. (P&F) 111 (Fed. Maritime Comm'n 1985). There, the Commission held that it had no authority to promulgate regulations regarding the substance of bills of lading, stating that COGSA is "a separate body of law governing shipowner rights and obligations which is subject only to court interpretation. . . ." *Id.* at 113.

Second, even though the Shipping Act defines both vessel operators and NVOCCs as "common carriers," the two are not treated the same for all regulatory purposes. For example, vessel operators are granted a limited antitrust immunity to the extent that they act collectively under agreements filed with the agency. 46 U.S.C. § 1703(a) (addressing agreements by or among "ocean common carriers").[10] In addition, the Shipping Act allows vessel operators ("ocean common carriers"), but not NVOCCs, to enter into service contracts as an alternative to setting rates in a tariff. That NVOCCs may not enter into service contracts with their customers[11] is made clear by the Shipping Act's definition of "service contract," which is "a written contract, other than a bill of lading or a receipt, between one or more shippers and an *individual ocean common carrier or an agreement between or among ocean common carriers*. . . ." 46 U.S.C.App. §1702(19) (emphasis added). [12] In sum, although the Shipping Act treats NVOCCs as "carriers," it does not treat them the same as vessel operators.[13] The distinctions are relevant because they

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[10] The Shipping Act defines "ocean common carrier" as "a vessel-operating common carrier." 46 U.S.C.App. § 1702(16).

[11] Because an NVOCC is "a shipper in its relationship with an ocean common carrier," 46 U.S.C.App. § 1702(17)(B), the NVOCC can, as a shipper, enter a service contract with a vessel-operating ocean carrier.

[12] 46 U.S.C.App. § 1709(b)(2) requires that common carriers provide service "in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under section 8 of this Act. . . ." Nothing in that section or any other provision of the Shipping Act relieves vessel operating common carriers that establish prices and terms under service contracts from the obligation under 46 U.S.C.App. § 1707(a)(1)(E) to publish a tariff that contains a sample copy of the carrier's bill of lading.

[13] Although the Shipping Act definitions and relationships are not designed to affect the application of COGSA, to the extent that one were to seek guidance there, it is of some interest that both freight forwarders and NVOCCs are classified under the general heading of "ocean

act as a reminder that definitions and distinctions in the Shipping Act exist because they further the policies and purposes of that law. Those definitions and distinctions were not intended to and do not inform or affect in any way the proper treatment of NVOCCs under COGSA.

Although the court of appeals couched its decision in terms of agency, the language of the decision suggests that the court was most concerned about notice to the shipper of the terms of the vessel operator's (Hamburg Sud's) bill of lading. *See* Pet. App. 6a (in which the court below concluded that "ICC, not Kirby, hired Hamburg Sud, and ICC, not Kirby, is named on the bill as the shipper of the goods, which means that Kirby did not itself agree to the terms of the bill."). A combination of the fundamental nature of the transactions at issue, coupled with the application of the filed rate doctrine, renders the inescapable result that whether or not Kirby made any affirmative indication that it accepted the Hamburg Sud bill of lading terms, it was bound by them.[14]

Kirby knew full well that ICC would have to procure the services of an ocean carrier, who would in turn have to procure the services of other carriers, terminal operators, and stevedores to get Kirby's cargo from Australia to Alabama. Knowing that ICC relied entirely on other carriers to provide the services that ICC sold to Kirby, Kirby was on actual notice that ICC could sell to Kirby only what ICC was able to buy from Hamburg Sud. These realities of the transaction that ICC and Kirby entered into are sufficient to have imposed a duty on Kirby to inquire as to the terms upon which Hamburg Sud provided the transportation that ICC bought from Hamburg Sud and resold to Kirby. Having apparently failed

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transportation intermediaries," a term that aptly describes their roles as agents. 46 U.S.C. § 1702(17).

[14] Kirby's actual acceptance of the Hamburg Sud bill of lading is discussed in section III, *infra* at note 16.

to make that fundamental inquiry in the course of dispatching a multi-million dollar shipment halfway around the world, and having purchased insurance to cover any risk thus incurred, neither Kirby nor its insurer should now be heard to complain that they lacked knowledge of the terms of the services that ICC bought from Hamburg Sud and resold to Kirby.

Whatever duty to inquire the law might generally impose on a purchaser of resold services, federal statutory law in the field of ocean common carriage has done away with the need to rely on such a duty in order to bind an NVOCC's customer to the bill of lading issued by the vessel operator that actually carries the goods. 46 U.S.C.App. § 1707(a)(1)(E) requires that every common carrier serving the United States foreign trades publish a copy of its bill of lading in a publicly accessible tariff. It is a violation of 49 U.S.C.App. § 1709 (b)(2)(A) to provide ocean or through international transportation service that "is not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff. . . ." Put simply, the filed rate doctrine applies to terms that are required to be published in ocean carriers' tariffs, and bill of lading terms are required to be so published. Where the filed rate doctrine applies, the terms published do not just have the force of contract, they have the force of law. *See Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939). Thus, neither actual knowledge nor constructive knowledge of the terms of the published bill of lading is required; those published terms apply by operation of law.

Kirby affirmatively sought to obtain the benefit of the services covered by Hamburg Sud's tariff and was successful in doing so. Having gotten the benefit of its bargain, the filed rate doctrine binds Kirby to the terms of that bargain as published in the tariff of the carrier that moved the cargo, whether or not Kirby knew what those terms were and

whether or not Kirby even knew that they existed. As such, the concerns of the court of appeals regarding knowledge and notice were misplaced. Nothing in the result urged by petitioner prevents ICC and Kirby—as between themselves—from agreeing to a higher liability limitation; what is proscribed is the power that the court of appeals' decision would give to ICC to bargain away the limits that Hamburg Sud had published in its tariff and was bound by law to apply.

II. THE DECISION OF THE COURT OF APPEALS DIRECTLY CONFLICTS WITH A PRIOR ELEVENTH CIRCUIT DECISION.

For the reasons stated immediately above, the holding of the court of appeals that ICC did not act as Kirby's agent should be reversed. That holding should also be reversed because it directly conflicts with a prior Eleventh Circuit decision. In *Insurance Co. of North America v. M/V Ocean Lynx*, 901 F.2d 934 (11th Cir. 1990), the court stated with respect to a transaction involving an NVOCC that: "Edusystems [the shipper] may treat Mar [the NVOCC] as a common carrier for the purposes of COGSA, but underlying carriers such as Bottacchi [the vessel operator] treat Mar as Edusystems' agent." *Id.* at 937 n.2. The court then went on to apply the terms of the vessel operator's bill of lading in limitation of a claim brought by the cargo owner's subrogee. Because the Eleventh Circuit's policy regarding circuit precedent is that a later three-judge panel may not disregard an earlier three-judge panel's decision, *see United States v. Lehder-Rivas*, 827 F.2d 682, 683 (11th Cir. 1987), the *Kirby* panel did not have the authority to overrule *Ocean Lynx*.

III. KIRBY WAS BOUND BY THE HAMBURG SUD BILL OF LADING AS EITHER A DIRECT PARTY TO OR A THIRD PARTY BENEFICIARY OF THAT BILL OF LADING.

Although the issue has not been briefed by the parties, amicus WSC notes that a holding under which the shipper and the vessel operator are bound by the vessel operator's bill of lading in situations in which there is an intermediary NVOCC is supported by precedent in both the Ninth Circuit and the Eleventh Circuit, independent of the NVOCC's status as an agent. In *All Pacific Trading, Inc. v. Vessel M/V Hanjin Yosu, 7 F.3d 1427* (9th Cir. 1993), the court held that an owner of the goods that contracted with an NVOCC for transportation was a direct party to the bill of lading issued by the vessel operator with which the NVOCC contracted. The basis of that holding was the definition of "Merchant" in the vessel operator's bill of lading. "Merchant" was there defined to include "the shipper, consignor, consignee, owner and receiver of the Goods and the Holder of this Bill of Lading." *Id.* at 1432.[15] Finding that the cargo owner had accepted this

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[15] Both the Hamburg Sud and ICC bills of lading contain definitions of "Merchant" that are functionally indistinguishable from the definition in the bill of lading in *All Pacific*. *See* J.A. at 59, 85. This term is ubiquitous in industry bills of lading. Looking at the transaction from the vessel operator's perspective, it is obvious that the bundle of terms and conditions that the vessel operator sells to the NVOCC includes rights and responsibilities on the part of cargo interests such as the NVOCC's customers. By placing those rights and responsibilities in its bill of lading, which the vessel operator must by law publish as part of its tariff, the vessel operator has done all that it must and all that it can to give notice to the world of those terms. If the NVOCC fails to share with its customer the terms on which the NVOCC has procured carriage for the customer's cargo, or if the customer fails to inquire of the NVOCC about those terms, the implications of those failures should remain between the NVOCC and its customer. The vessel operator's rights, which would be clear absent the participation of the NVOCC, should not be affected.

bill of lading by suing the vessel operator for damage to the owner's cargo,[16] the court held that the plain terms of the bill of lading made the cargo owner a direct party to the vessel operator's bill of lading. *Id.*

The Eleventh Circuit cited *All Pacific* with approval in *Polo Ralph Lauren L.P. v. Tropical Shipping & Construction Co.*, 215 F.3d 1217, 1222 (2000). In *Tropical Shipping*, the court of appeals held that a cargo owner not named on the bill of lading could sue a vessel operator as a direct party to the bill of lading or as a third party beneficiary to the bill of lading. There, the bill of lading made reference to the "shipper, consignee or owner of the goods" as being parties to the contract. *Id.* Thus, even though the entity named as the "shipper" on the bill of lading was a bailee of the cargo owner, and the cargo owner's name appeared nowhere on the bill, the court held that the cargo owner, if it could demonstrate ownership, could sue under the terms of the bill of lading. *Id.* at 1223.

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[16] The court in *All Pacific* noted that COGSA contains no statutory requirement for acceptance of the bill of lading, but stated that state law required acceptance. *Id.* To the extent that acceptance may be required, and the cargo interest has not accepted by suing on the contract, that requirement should be satisfied by the combination of (1) the fact that the shipper tendering cargo knows that the cargo will be delivered to a vessel operator for transport, and (2) the shipper is deemed by law to have knowledge of the vessel operator's bill of lading terms by virtue of the filed rate doctrine and the Shipping Act's requirement that carriers publish a copy of their bill of lading in their tariffs. It would be no answer that Kirby did not know which vessel operator ICC would employ, because that carrier was identified on ICC's bill issued to Kirby. Even if the NVOCC did not advise the shipper of the identity of the underlying carrier, the shipper need only ask the NVOCC for that information. WSC knows of no case in which a court has excused a party from a contractual responsibility based on that party's avoidance of relevant and immediately accessible information about its own transaction. Kirby in fact brought an action against Hamburg Sud in Australia. *See* J.A. at 19-29.

Although both *All Pacific* and *Tropical Shipping* dealt with cases in which the cargo owner, not the vessel operator or its contractor, invoked the bill of lading, there is nothing to suggest that the cases do not apply in both directions. If there is a contract, by definition the parties on both sides of the bargain are bound, and the rationale of the cases has equal validity whether it is a carrier or cargo interest that invokes the contract. In other words, one can choose whether or not to enforce one's rights, but the existence of those rights does not depend on the decision of whether or not to enforce them.

The concept that a cargo owner that is not named as a shipper on a vessel operator's bill of lading may nevertheless be a direct party to or a third party beneficiary of the vessel operator's bill of lading for cargo liability purposes is entirely consistent with the fact that it is during the physical carriage by the vessel operator or its contractor that cargo damage resulting in liability may occur. It is to this relationship between shipper and vessel owner or charterer that COGSA speaks and makes mandatory its limitations on liability. *See* 46 U.S.C.App. § 1302 (making applicable the "rights and immunities" of sections 1303 and 1304 to "the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods"). Moreover, it is settled law that a vessel operator has a lien on the cargo to satisfy unpaid freight. *See The Bird of Paradise*, 72 U.S. (5 Wall.) 545, 554 (1866). That lien exists irrespective of whether the cargo against which the lien was asserted was tendered to the vessel operator directly by the shipper or through an NVOCC. *See, e.g., Johnson Prods. Co. v. M/V La Molinera*, 628 F.Supp. 1240, 1248 (S.D.N.Y. 1986) (vessel operator entitled to lien on cargo without regard to malfeasance of freight forwarder and NVOCC). In either case the law recognizes the relationship between the cargo and the ship, further evidence that the cargo owner is bound as either a direct party to or as a third party beneficiary of the vessel operator's bill of lading. Seen against this background of a

long recognized relationship between the cargo owner and the vessel operator that is unaffected by the insertion of an NVOCC, recognition that the cargo owner is bound by the vessel operator's bill of lading for COGSA purposes is no more than application of an established rule.

CONCLUSION

Both because ICC's bill of lading was sufficiently explicit to extend COGSA's liability limits to Norfolk Southern and also because ICC acted as Kirby's agent for the purpose of binding Kirby to Hamburg Sud's bill of lading, the court of appeals' decision should be reversed.

Respectfully submitted,

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